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## United States v. Varig Airlines: The Supreme Court Narrows the Scope of Government Liability under the Federal Tort Claims Act

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# UNITED STATES V. VARIG AIRLINES: THE SUPREME COURT NARROWS THE SCOPE OF GOVERNMENT LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT

MITCHELL E.F. PLAVE\*

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## I: INTRODUCTION

The Federal Tort Claims Act ("FTCA" or "Act")<sup>1</sup> provides that the United States may be held liable in tort for injuries caused by the negligent acts or omissions of government employees.<sup>2</sup> This waiver of sovereign immunity reflects Congress' sentiment that the United States government should be held legally responsible for its negligent conduct.<sup>3</sup> This waiver is restricted by the discretionary function exception to FTCA claims.<sup>4</sup> The

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<sup>1</sup> 28 U.S.C. §§ 1346(b), 2671, 2680(a)-(n)(1982) [hereinafter "FTCA"]. Section 1346(b) provides:

Subject to the provisions of Chapter 171 of this Title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful acts or omissions of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

*Id.* Section 2671 provides:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal Agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

*Id.*

"Employee of the Government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under sections 316, 502, 503, 504 or 505 of title 32, and persons acting on behalf of a federal agency in a official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

*Id.*

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in the line of duty.

*Id.*

<sup>2</sup> *Id.* § 1346(b).

<sup>3</sup> See H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2, *reprinted in* 1946 U.S. CODE CONG. & AD. NEWS 807 (discussing goals and purpose of torts claims act).

<sup>4</sup> FTCA § 2680(a). Section 2680(a) states:

discretionary function exception exempts the United States from liability for damages arising from the use or abuse of discretionary government powers.<sup>5</sup>

Since 1953, federal courts have struggled with the application of the discretionary function exception to cases in which federal government agencies negligently inspect and "certificate" private industries' compliance with federal regulation.<sup>6</sup> Following the Supreme Court descisions in *Dalehite v. United States*<sup>7</sup> and *Indian Towing v. United States*,<sup>8</sup> courts typically imposed liability on the United

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The provisions of this chapter and section 1346(b) of this Title shall not apply to: Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not discretion involved be abused.

*Id.* There are a number of other exceptions to the FTCA including; the loss of mail by the U.S.; the negligence of government tax or customs officers; admiralty claims; government acts in administering section 1-31 of title 50; any claim arising out of a quarantine by the U.S.; claims arising out of false imprisonment, assault and battery, malicious prosecution, deceit, or interference with contract rights by Federal law enforcement officers. *Id.*

<sup>5</sup> *Id.* See also H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2, reprinted in 1946 U.S. CODE CONG. & AD. NEWS 807 (discussing goals and purpose of torts claims act).

<sup>6</sup> 49 U.S.C. § 1421(a)(1) (1982). Certification is the process of the government deciding in a particular case that a person or machine meets standards provided in the federal regulations. For examples of courts' application of the discretionary function exception to negligent inspection see, e.g., *Dalehite v. United States*, 346 U.S. 15, 22 (1953) (discussing claim based on negligent certification of scientific process); *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (finding enforcement of safety regulations governing manufacture of explosives nondiscretionary); *Garbarino v. United States*, 666 F.2d 1061, 1065 (6th Cir. 1981) (finding no liability for negligent certification of aircraft); *Lodge v. United States*, 662 F.2d 1268, 1273 (8th Cir. 1981) (finding no discretion to disregard regulations governing license of polio vaccines), *cert. denied*, 456 U.S. 944 (1982); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227, 238 (2d Cir.) (finding no discretion to disregard air traffic control regulations), *cert. denied*, 389 U.S. 931 (1967).

<sup>7</sup> 346 U.S. 15, 42 (1953). In *Dalehite*, the seminal case on the discretionary function exception, the Supreme Court held that the United States was not liable for damages arising out of an explosion because the program leading to the explosion was discretionary and because the negligence occurred at the policy level. *Id.* In interpreting the legislative history of the Act and the discretionary function exception, the Court concluded that Congress intended the discretionary function exception to cover discretionary acts at the policy making level. *Id.* at 20-28.

<sup>8</sup> 350 U.S. 61, 75 (1955). The Court in *Indian Towing* held the United States

States only after the negligent acts involved in certification passed beyond the policy making stage and into the policy-implementation stage.<sup>9</sup> The Supreme Court drastically narrowed the scope of government liability under the FTCA in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (United States v. Varig Airlines)*<sup>10</sup> and *United States v. Scottish-Insurance Co.*,<sup>11</sup> the case joined with *Varig*.<sup>12</sup> *Varig*

liable under the FTCA for the Coast Guard's negligence in operating a lighthouse because the negligence was operational and did not involve policy making discretion. *Id.* In *Indian Towing*, a leading case interpreting the FTCA, the Court clarified *Dalehite* by emphasizing the planning/operation distinction. *Id.* at 67-75. The effect of this distinction was to impose liability on the United States for negligence in carrying out a decision and protected the United States from suit where its negligence occurred at the policy making level. *Id.*

<sup>9</sup> See, e.g., *Miller v. United States*, 583 F.2d 857, 866 (6th Cir. 1978) (finding U.S. negligence in supervision of flood gates operational); *Downs v. United States*, 552 F.2d 990, 995 (6th Cir. 1975) (holding United States liable for FBI's negligent handling of aircraft hijacking and finding negligence operational); *Driscoll v. United States*, 525 F.2d 136, 139 (9th Cir. 1975) (finding negligent design of cross walk warning operational); *Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) (holding U.S. liable for negligent inspection of vaccine); *Stork v. United States*, 430 F.2d 1104, 1110 (9th Cir. 1970) (finding control tower negligence operational); *Hendry v. United States*, 418 F.2d 774, 784 (2d Cir. 1969) (holding U.S. liable for negligent licensing of ship officer); *United States v. Furimizo*, 381 F.2d 965, 968 (9th Cir. 1967) (finding air traffic controller negligence operational); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 70 (D.C. Cir.) (per curiam) (holding U.S. liable for operational air traffic controller negligence), *aff'd sum nom.* *United States v. Union Trust Co.*, 350 U.S. 907 (1955); *Hoffman v. United States*, 398 F. Supp. 530, 545 (E.D. Mich. 1975) (concerning negligent air safety regulation). See also *Tompkins, The Liability of the United States for Negligent Certification of Aircraft*, 17 *FORUM* 569, 586-89 (1982) [hereinafter cited as *Tompkins, Negligent Certification*] (noting that courts usually consider the planning/operation distinction in cases involving discretionary function exception).

<sup>10</sup> 104 S. Ct. 2755, 2768 (1984). In *Varig*, a Boeing 707 burned because a smoldering cigarette was not extinguished when placed in a lavatory trash receptacle. *Id.* at 2758. The Court found that, under FAA regulations, the fire should have been contained in the disposal. *Id.* The Court found that the decision by the FAA not to inspect the trash receptacle was discretionary. *Id.* at 2767-68. The Court reversed the lower court's decision and held that the discretionary function exception protected the U.S. from liability. *Id.* at 2769.

<sup>11</sup> 104 S. Ct. 2755, 2759 (1984). In *United Scottish*, a small plane caught fire in mid-air and crashed, killing all of its occupants. *Id.* at 2759. A faulty heater in the aircraft caused the crash. *Id.* The Supreme Court found that the FAA's negligence was discretionary. *Id.* at 2766. The Court reversed the lower court's decision and held that the discretionary function exception protected the U.S. from liability. *Id.* at 2769.

<sup>12</sup> The Supreme Court decided these cases together because both cases concerned claims that the Federal Aviation Administration approved aircraft for

and *United Scottish* involved the negligence of the Federal Aviation Administration ("FAA") in certificating and inspecting two aircraft.<sup>13</sup> In *Varig*, the court held that the United States was not liable for 135 deaths and other damages resulting from the FAA's negligent decision not to inspect a lavatory disposal unit in a Boeing 707.<sup>14</sup> In *United Scottish*, the Court held that the government was not liable for deaths and damages arising out of the negligence of an FAA inspector in checking the installation of a modified heater in a DeHavilland Dove aircraft.<sup>15</sup> In these joined cases, the Supreme Court extended the discretionary function exception beyond the policy making level and held that the negligence of FAA inspections was discretionary and was protected by the discretionary function exception.<sup>16</sup> The Court included the FAA's entire inspection and certification process in its construction of discretionary acts.<sup>17</sup>

This Comment examines the Supreme Court's decision in *Varig* and prior decisions of the federal courts to assess the changes that *Varig* makes in the law. Part II examines case law on the FTCA and the discretionary function exception. Part III reviews the certification and inspection process. Part IV reviews the facts of *Varig* and *United Scottish*. Part V analyzes the Court's reasoning and critiques

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flight. *Id.* at 2757. For the purpose of this discussion, *United Scottish* will be referred to implicitly in future cites to *Varig* alone.

<sup>13</sup> 104 S. Ct. at 2755 (1984). In the process of certificating an aircraft, the FAA inspects portions of the aircraft to ensure compliance of the manufacturer with federal regulations. See 14 C.F.R. § 183.29 (1984).

<sup>14</sup> 104 S. Ct. at 2755.

<sup>15</sup> *Id.*

<sup>16</sup> 104 S. Ct. at 2755, 2765-68 (deciding that Congress did not intend to subject regulatory agencies to FTCA liability). See also *Natural Gas Pipeline Co. v. United States*, 742 F.2d 502, 512 (9th Cir. 1984) (holding that *Varig* extended discretionary function exception to entire certification process); *Proctor v. United States*, No. CV 83-3415, slip op. at 3 (C.D. Cal. Aug. 21, 1984) (finding that *Varig* extended the discretionary function exception to negligent certification). See generally, Hatfield, *View from Justice: FAA not Liable for Negligent Certification*, LPBA JOURNAL, Sept. 1984, at 4 [hereinafter cited as Hatfield, *View from Justice*] (arguing that *Varig* extended the discretionary function exception to negligent inspection at the operational level).

<sup>17</sup> 104 S. Ct. at 2765-68.

the weaknesses of the *Varig* opinion. Finally, Part VI of the discussion focuses on the broad implications of the *Varig* decision.

## II: LIABILITY OF THE UNITED STATES: THE FEDERAL TORT CLAIMS ACT

### A. *The Legislative History of the Federal Tort Claims Act*

Congress enacted the Federal Tort Claims Act (the "Act") in 1946 after more than twenty-five years of consideration.<sup>18</sup> The proliferation of private bills to settle tort claims against the United States led Congress to consider a comprehensive legislative response to such tort claims.<sup>19</sup> The legislative history of the Act indicates that Congress intended to waive sovereign immunity in suits arising from the tortious acts of United States agents acting within their scope of duty.<sup>20</sup> Congress was primarily

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<sup>18</sup> FTCA §§ 1346(b), 2671, 2680(a)-2680(n). See *Hearings Before the House Committee on the Judiciary on H.R. 5373 and 6463*, 77th Cong., 2d Sess. 24 (1955) (discussing history of waivers of sovereign immunity). Congress authorized suit against the United States prior to 1946. *Id.* In 1855, Congress established the Court of Claims and consented to suit against the United States for claims arising from United States contracts or Federal law. *Id.* In 1910, Congress consented to suits against the United States in the Court of Claims for patent infringement. *Id.* During World War I, when the government operated the railroads, Congress allowed suit against the United States for property damage, personal injury and death arising from railroad activities. *Id.* at 25. In 1925, the government consented to suits against it arising from maritime torts involving government vessels. *Id.*

<sup>19</sup> See H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2, reprinted in 1946 U.S. CODE CONG. & AD. NEWS 807 (discussing policy and goals for FTCA). A private bill is a piece of legislation introduced on behalf of an individual to redress the individual's problem. BLACK'S LAW DICTIONARY 1076 (5th ed. 1979). In the 68th Congress, approximately 2,200 private bills were introduced, of which about 250 became law. H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2, reprinted in 1946 U.S. CODE & AD. NEWS 807 (discussing need for FTCA). In the 70th Congress, 2,268 private bills were introduced, of which 336 were enacted, with \$562 million paid for tort claims. *Id.* More recently, in the 77th Congress, 1,829 private bills were introduced and 593 were approved for a total of just over one million dollars. *Id.* See also Reynolds, *The Discretionary Function Exception and the Federal Tort Claims Act*, 57 GEO. L.J. 81 n.5 (1968) (arguing that private bill system was cumbersome and unresponsive to needs of claimants).

<sup>20</sup> See *Hearings Before a Subcommittee of the House Committee on Claims on a General Tort Bill*, 72d Cong. 1st Sess. 17 (1932) (discussing parameters of proposed torts act). See also *Feres v. United States*, 340 U.S. 135 (1950) (concerning allegations

concerned with ordinary common law torts,<sup>21</sup> but a wide variety of claims have fallen within the Federal Tort Claims Act since its inception.<sup>22</sup> The legislative history of the Act also indicates that the discretionary function exception was drafted to protect the government against tort liability for errors in administration or exercise of discretionary functions.<sup>23</sup> The exception was drafted to ensure that the judiciary would be confined to an adjudication of facts rather than political or social issues.<sup>24</sup> The legislative history fails to indicate, however,

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of government negligence in quartering members of the armed forces in barracks known to be unsafe). In *Feres*, the Supreme Court held that the term "agent" excludes members of the armed forces. *Id.* at 136-46. Therefore, a member of the armed forces may not sue the United States under the FTCA for the negligence of another serviceman. *Id.* For a discussion of the liability of the United States for negligence of members of the public who are appointed to inspect on the government's behalf, see Dilk, *Negligence of Federal Aviation Administration Delegates Under the Federal Tort Claims Act*, 42 J. AIR L. & COM. 575, 576-600 (1976) (arguing that Congress did not intend to subject U.S. to liability for negligence of government delegates).

<sup>21</sup> See H. R. REP. NO. 1287, 79th Cong., 1st Sess. 3, reprinted in 1946 U.S. CODE CONG. & AD. NEWS 803 (discussing jurisdiction under FTCA); *Hearings Before the House Committee on the Judiciary on H.R. 5373 and 6463*, 77th Cong., 2d Sess. 24 (1955) (statement of Assistant Attorney General Francis M. Shea) (referring to types of negligence actionable under FTCA). See also *Downs v. United States*, 522 F.2d 990, 995 (10th Cir. 1975) (discussing legislative history of FTCA). Congress most frequently referred to common law torts in its discussion of the types of actions to which the bill would apply. *Id.* Negligent driving was the most common example of tort liability referred to in these hearings. *Id.*

<sup>22</sup> See *Downs v. United States*, 522 F.2d 990, 995-99 (10th Cir. 1975) (discussing legislative history of FTCA and common application of FTCA in wide variety of situations). See also, *Indian Towing v. United States*, 350 U.S. 61, 75 (1955) (holding United States liable for failure to maintain lighthouse); *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (finding enforcement of safety regulations governing manufacture of explosives nondiscretionary); *Underwood v. United States*, 356 F.2d 92, 93-94 (5th Cir. 1966) (holding U.S. liable for negligent decision of government psychiatrist to release patient from hospital).

<sup>23</sup> See *Hearings Before the House Committee on the Judiciary on H.R. 5373 and 6463*, 77th Cong., 2d Sess. 14 (1955) (discussing purpose of FTCA). The discretionary function exception developed as a means of avoiding any possibility that the FTCA would be construed to authorize damage suits against the government arising out of a federal project or expenditure of federal funds, simply because the similar discretionary conduct by a private individual would be tortious. See also *Dalehite v. United States*, 346 U.S. 15, 40 (1953) (interpreting the legislative history of the discretionary function exception).

<sup>24</sup> See H.R. REP. NO. 2428, 76th Cong., 2d Sess. 3, reprinted in 1944 U.S. CODE CONG. & AD. NEWS 106 (discussing purpose of discretionary function exception).



whether the discretionary function exception should be extended to include the negligence of government employees that implement discretionary government activities.<sup>25</sup> This ambiguity in the legislative history has led to differing interpretations of the scope of the discretionary function exception.<sup>26</sup>

### B. *The Development of the Planning-Operation Distinction*

Courts interpreting the discretionary function exception prior to *Varig* imposed liability on the United States under the FTCA for negligence in the implementation of a program and have not held the United States liable for negligence in the creation of a program.<sup>27</sup> These courts emphasized that there is policy level discretion available to the individual at the planning stage and that there is no such discretion at the implementation or "operational" level.<sup>28</sup> This deceptively simple distinction is generally

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*See also* *Dalehite v. United States*, 346 U.S. 15, 43 (1953) (discussing legislative history of FTCA).

<sup>25</sup> *See* *Downs v. United States*, 522 F.2d 990, 998 (10th Cir. 1975) (discussing weaknesses in Congress' deliberations concerning the discretionary function exception and reviewing cases interpreting the discretionary function exception). *See also* *Hearings Before the House Committee on the Judiciary on H.R. 5373 and 6463*, 77th Cong., 2d Sess. 33 (1955) (explaining in general terms the boundaries of the discretionary function exception as including "government authorized activity" such as flood control or irrigation projects where no negligence on part of any government agent is shown). *See also* Harrison, *Government Liability for Certification of Aircraft?* 44 J. AIR L. & COM. 23, 34 (1978) [hereinafter cited as Harrison, *Government Liability*] (suggesting that Congress failed to define those functions it considered discretionary).

<sup>26</sup> For discussion, see notes 16-18 and accompanying text.

<sup>27</sup> *See, e.g.,* *Indian Towing v. United States*, 350 U.S. 61, 70 (1955) (finding negligent operation of lighthouse by Coast Guard operational); *Dalehite v. United States*, 346 U.S. 15, 41 (1953) (finding U.S. not liable for damages arising out of explosion because program leading to explosion was discretionary and because negligence was not at operational level).

<sup>28</sup> The idea of a distinction between nonactionable planning and actionable negligence in carrying out a plan was articulated by the Supreme Court as early as 1886 in *Johnston v. District of Columbia*, 118 U.S. 19 (1886). In *Johnston*, the Court found that the decision of municipal authorities to adopt a general plan of drainage and to determine where the sewers were to be built was discretionary, since such a decision involved considerations of public health. *Id.* at 27. The negligent physical construction and repair of sewers was held to be actionable. *Id.* *See also* *Arney v. United States*, 479 F.2d 653, 670 (9th Cir. 1973) (finding that the discretionary function exception does not protect United States negligence in air-

known as the "planning/operation distinction."<sup>29</sup>

The Court developed the foundation for the planning/operation distinction in *Dalehite v. United States*.<sup>30</sup> The Court in *Dalehite* held that the discretionary function

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plane certification); *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973) (applying discretionary function exception to negligent government decision to test military aircraft); *Pigott v. United States*, 451 F.2d 574, 582 (5th Cir. 1971) (holding U.S. liable for decision of when to test fire Saturn S-IC rocket); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75 (D.C. Cir.) (per curiam) (construing air traffic controller negligence as operational), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955); *United States v. Gray*, 199 F.2d 239, 245 (10th Cir. 1952) (holding United States liable for failure to prevent patient from jumping out of hospital window); *Somerset Seafood Co. v. United States*, 193 F.2d 631, 640-42 (4th Cir. 1951) (holding that decision to remove or mark wreck which led to boating accident was discretionary, but no discretion available to negligently carry out plan to mark waters); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950) (finding that once decision was made to provide hospital care to a military dependent there was no discretion left to hospital authorities to treat patient).

<sup>29</sup> See, e.g., *Downs v. United States*, 552 F.2d 990, 996-97 (10th Cir. 1975) (noting that courts typically use planning/operation distinction); *United States v. Washington*, 351 F.2d 913, 916 (9th Cir. 1965) (applying planning/operation distinction to claim for negligent design of power lines leading to aircraft crash); *Whits v. United States*, 317 F.2d 13, 17 (4th Cir. 1963) (applying planning/operation distinction to negligent release of patient from mental hospital); *Mahler v. United States*, 306 F.2d 713, 717 (3d Cir.) (applying planning/operation distinction to claim for negligent highway design), *cert. denied*, 371 U.S. 923 (1962); *United States v. Gregory*, 300 F.2d 11, 13 (10th Cir. 1962) (applying planning/operation distinction to government decision regarding waterworks); *Dahlstrom v. United States*, 228 F.2d 819, 823 (8th Cir. 1956) (applying planning/operation distinction to negligence of government pilot); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 69 (D.C. Cir.) (per curiam) (applying planning/operation distinction to negligence of air traffic controller), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955); *Blessing v. United States*, 447 F. Supp. 1160, 1162 (E.D. Pa. 1978) (applying planning/operation distinction to negligence of Occupational Safety and Health Administration).

<sup>30</sup> 346 U.S. 15, 42 (1953) (finding government planning level decision to produce fertilizer for export discretionary). The Court traced the cause of the explosion to the Cabinet level "FGAN Plan" and pointed out that the negligent acts leading to the explosion were in accordance with that plan. *Id.* The Court made it clear that the decision not to police the shipboard loading of the fertilizer was made at the policy-forming level, and was not the decision of individual members of the Coast Guard. *Id.* The Court implied that the U.S. would have been held liable had the Coast Guard authorities decided to supervise the storage of the fertilizer. See *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 69 (D.C. Cir.) (per curiam) (suggesting that if negligence in *Dalehite* had been at implementation level Court would have held U.S. liable), *aff'd sum nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955). The general principle of *Dalehite* is that the U.S. is liable for the negligence of its employees at the operational level. *Dalehite v. United States*, 346 U.S. 15, 42 (1953).

exception extends to the "acts of subordinates" in planning and carrying out high level policy decisions of the government.<sup>31</sup> The Court characterized "acts of subordinates" as the execution of high level policy decisions made by executives and administrators in establishing plans, specifications, or schedules of operation.<sup>32</sup> The Court described "high level policy decisions" as those that are made at the planning level and include discretion in policy judgment.<sup>33</sup>

Courts have had difficulty in applying the planning/operation test to negligent certification cases because the language of the Court's opinion in *Dalehite* can

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<sup>31</sup> 346 U.S. at 36. The Court relied, in part, on lower court decisions that applied the discretionary function exception to policy level negligence. *Id.* See, e.g., *Coates v. United States*, 181 F.2d 816, 822 (8th Cir. 1950) (applying discretionary function exception to injury of crops and land from negligent government plan changing course of Mississippi River); *Boyce v. United States*, 93 F. Supp. 866, 869 (S.D. Iowa 1950) (applying discretionary function exception to injury from government blasting done in accordance with plans of chief engineer).

<sup>32</sup> 346 U.S. at 34. In addition, the Court held that "[w]here there is room for policy judgment and decision, there is discretion." *Id.* at 35-36. The breadth of this language has left open the question of how far the discretion extends, since discretion can arguably be found in all acts. See also *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.) (discussing problem of defining discretion and providing narrow interpretation of what is discretionary under *Dalehite*), cert. denied, 389 U.S. 841 (1967); *Blessing v. United States*, 447 F. Supp. 1160, 1174 (E.D. Pa. 1978) (rejecting view of *Dalehite* that would extend discretionary function exception to operational acts).

<sup>33</sup> 346 U.S. at 42. The Court's definition of the planning level in *Dalehite* was vague. See *Blessing v. United States*, 447 F. Supp. 1160, 1174 (E.D. Pa. 1978) (reviewing ambiguities of *Dalehite*). See *infra* note 34 for a critical discussion of the ambiguities in *Dalehite*. The reference in *Dalehite* to "high level policy decisions" is commonly cited to support the argument that *Dalehite* established that the government should be liable at the operational stage and immune under the discretionary function exception at the policy making stage. *Dalehite*, 346 U.S. at 42. Although the application of this planning/operation test to specific facts has often proved to be difficult, it is important to note that the test is used only where the claimant is questioning the implementation of regulations. *Id.* Where a claimant challenges the propriety of regulations, the activity becomes immune from liability following the characterization of the regulation as "legislative" as in *Dalehite*. *Id.*

In *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978), the district court suggested that the line between planning and operation is difficult to distinguish. *Id.* at 1173. The court found that most operations retain some planning elements until final execution. *Id.* This interpretation suggests that there is a considerable amount of discretion allowed to the judge to determine whether an act is to be characterized as planning or operational. *Id.*

be read to suggest a limited construction of the discretionary function exception, even though the specific holding of the case appears to establish a more expansive view of the exception.<sup>34</sup> The Court in *Dalehite* noted that the policy decisions leading to government's liability were important to the practicability of the government fertilizer program.<sup>35</sup> The Court distinguished between agency decisions critical to the government program and less critical agency decisions.<sup>36</sup> This distinction suggests that the focus of inquiry is on the nature of decision making itself.<sup>37</sup> Such a focus offers a narrow standard for what the discretionary function exception would cover.<sup>38</sup> On the other hand, the Court's finding that the Army's negligent labeling of fertilizer bags was discretionary indicates a more expansive view of the discretionary function exception.<sup>39</sup> The expansive view of the discretionary function exception would extend the exception to almost any act of the government involving judgment.<sup>40</sup> The problem in reconciling the Court's language in *Dalehite* with its findings is that it is not clear how the considerations going into the labeling decision were truly critical to the overall practicability of the government program or why the labeling depended on policy considerations.<sup>41</sup> Nevertheless, this planning/operation test has been used consistently in negligence cases that involved the discre-

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<sup>34</sup> See, e.g. *Pigott v. United States*, 451 F.2d 574, 575 (5th Cir. 1971) (noting ambiguities of *Dalehite* and rejecting expansive view of *Dalehite*); *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.) (rejecting expansive view of *Dalehite* and suggesting that such view would limit U.S. liability to auto accident cases), *cert. denied*, 389 U.S. 841 (1967); *Blessing v. United States*, 447 F. Supp. 1160, 1175 n.23 (E.D. Pa. 1978) (finding that *Indian Towing* limited *Dalehite* to narrower view of discretionary function exception).

<sup>35</sup> 346 U.S. at 43.

<sup>36</sup> *Id.* See also *Blessing v. United States*, 447 F.Supp. 1160, 1160-1174 (E.D. Pa. 1978) (discussing ambiguity of *Dalehite*).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1174 n.21.

<sup>39</sup> 346 U.S. at 45-55.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* See generally *Tompkins, Negligent Certification*, *supra* note 9, at 589 (discussing difficulties courts have had in applying planning/operation distinction).

tionary function exception.<sup>42</sup>

The Supreme Court further defined the limits of the discretionary function exception in *Indian Towing v. United States*.<sup>43</sup> In *Indian Towing*, a ship ran aground because the Coast Guard negligently maintained a lighthouse.<sup>44</sup> The Court rejected the government's argument that the discretionary function exception should apply to uniquely governmental functions.<sup>45</sup> The court found that the significant inquiry for application of the discretionary function exception was whether a private person would be liable for negligence in similar circumstances.<sup>46</sup> The Court found that once the United States made a discretionary decision to provide a service, it had to provide the service with due care.<sup>47</sup> Courts applying the rule devel-

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<sup>42</sup> See, e.g., *Miller v. United States*, 583 F.2d 857, 866 (6th Cir. 1978) (finding U.S. negligent in supervision of flood gates operational); *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975) (holding U.S. liable for FBI's negligent handling of aircraft hijacking and finding negligence operational); *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975) (finding negligent design of cross walk warning operational); *Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) (holding U.S. liable for negligent inspection of vaccine); *Stork v. United States*, 430 F.2d 1104, 1107 (9th Cir. 1970) (finding control tower negligence operational); *Hendry v. United States*, 418 F.2d 774, 784 (2d Cir. 1969) (holding U.S. liable for negligent licensing of ship officer); *United States v. Furimizo*, 381 F.2d 965, 968 (9th Cir. 1967) (finding air traffic controller negligence operational); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75 (D.C. Cir. 1965) (per curiam) (holding U.S. liable for operational air traffic controller negligence), *aff'd sub nom.* *United States v. Union Trust Co.*, 350 U.S. 907 (1955); *Hoffman v. United States*, 398 F. Supp. 530, 534 (E.D. Mich. 1975) (concerning negligent air safety regulation).

<sup>43</sup> 350 U.S. 61, 69 (1955) (finding negligence of Coast Guard lighthouse officer leading to ship grounding operational and nondiscretionary). The Court emphasized its creation of the planning/operation distinction in *Dalehite*. *Id.* at 64.

<sup>44</sup> *Id.* at 62.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 69.

<sup>47</sup> *Id.* at 68-69. The Court noted that the public relied on the Coast Guard's lighthouses and that this reliance created a duty to properly maintain these facilities. *Id.* The discussion of reliance in *Indian Towing* may have led to the trend in litigation against federal agencies toward similar reliance arguments based on "Good Samaritan" statutes. Under the Good Samaritan doctrine, a court will impose liability on a volunteer rescuer if he takes on the duty of helping a person in distress and then acts negligently in caring for the person. See BLACK'S LAW DICTIONARY 624 (5th ed. 1979). See, e.g., *Clement v. United States*, 567 F.2d 1140, 1145 (1st Cir. 1977) (applying "Good Samaritan" doctrine to claim for FAA negligence); *Spaulding v. United States*, 455 F.2d 222, 227 (9th Cir. 1972) (holding

oped in *Indian Towing* have characterized the failure of a federal agency to correctly perform a mandatory act as operational.<sup>48</sup> The Court in *Indian Towing* concluded that the discretionary function exception did not apply to an operational activity, even though it stemmed from a discretionary decision.<sup>49</sup>

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that air traffic controllers' warning about weather was sufficient to meet duty to warn); *Yates v. United States*, 497 F.2d 878, 884 (10th Cir. 1974) (holding government liable for failure of air traffic controller to warn pilot of wake turbulence); *Arney v. United States*, 479 F.2d 653, 654 (9th Cir. 1973) (holding that discretionary function exception does not protect negligent FAA inspection); *Gill v. United States*, 429 F.2d 1072, 1074 (5th Cir. 1970) (finding government not liable for supplying inexact and incomplete weather information to pilots). See also RESTATEMENT (SECOND) OF TORTS §§ 323, 324(a) (1965) (stating that under "Good Samaritan" principle once duty is assumed it must be carried out with due care); Note, *Government Inspection and Certification of Private Property*, 46 J. AIR L. & COM. 525, 532-34 (1980) (discussing "Good Samaritan" doctrine and FTCA litigation).

<sup>48</sup> See, e.g., *Hylin v. United States*, 715 F.2d 1206, 1213 (7th Cir. 1983) (holding negligent inspection of clay mine and failure to enforce mandatory safety standards not protected by discretionary function exception); *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (finding enforcement of safety regulations governing manufacture of ammunition not within discretionary function exception); *Loge v. United States*, 662 F.2d 1268, 1273 (8th Cir. 1981) (finding no discretion to disregard mandatory regulatory commands governing license of polio vaccine), *cert. denied*, 456 U.S. 944 (1982); *Clemente v. United States*, 567 F.2d 1140, 1145 (1st Cir. 1974) (applying "Good Samaritan" doctrine against U.S. for negligent acts of air traffic controllers); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (finding failure to follow mandatory regulations regarding polio vaccine program non-discretionary); *Yates v. United States*, 497 F.2d 878, 884 (10th Cir. 1974) (imposing liability on United States for air traffic controllers' failure to warn of wake turbulence); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227, 238 (2d Cir. 1967) (finding no discretion to disregard air traffic control regulations), *cert. denied*, 389 U.S. 931 (1967); *United Airlines v. Wiener*, 335 F.2d 379, 394-95 (9th Cir. 1964) (finding no discretion to violate regulations concerning segregation of air traffic), *cert. denied*, 379 U.S. 951 (1964); *Hoffman v. United States*, 398 F. Supp. 530, 533-38 (E.D. Mich. 1975), *aff'd*, 600 F.2d 590 (6th Cir. 1979) (finding no discretion for FAA to ignore federal regulations), *cert. denied*, 444 U.S. 1073 (1980); *Rapp v. Eastern Airlines, Inc.*, 264 F. Supp. 673, 681 (E.D. Pa. 1967) (finding that the discretionary function exception does not protect FAA's negligent failure to revise standards for faulty engine), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970); *Cf. Hatahley v. United States*, 351 U.S. 173, 180-82 (1956) (concerning failure to follow livestock grazing regulation).

<sup>49</sup> 350 U.S. at 64, 69. The government conceded that the actual operation of the lighthouse did not involve discretion or the discretionary function exception. *Id.* at 64. The government argued that the language of the FTCA imposing liability "in the same manner and to the same extent as private individuals under like circumstances" should be read to exclude from liability activities that private persons do not perform. *Id.* The Court rejected this argument as spurious, finding

The United States Court of Appeals for the District of Columbia Circuit further clarified the planning/operation test in *Eastern Air Lines, Inc. v. Union Trust Co.*<sup>50</sup> In *Eastern Airlines*, the negligence of air traffic controllers led to a mid-air collision between two aircrafts.<sup>51</sup> The court focused on the process of decision making and the rank of the employees involved to assess the nature of the government's discretion.<sup>52</sup> The court found that, although some individual discretion was involved in the air traffic controllers' handling of the two aircraft, it was not at the policy making level and, therefore, did not fall within the discretionary function exception.<sup>53</sup> The court compared the negligence of the tower operators to that of a negligent government driver and concluded that both exercised discretion, but not the type of policy making discretion contemplated by the discretionary function exception.<sup>54</sup> The court found that the air traffic controllers' negligence did not fall within the discretionary function exception and held the government liable under the FTCA.<sup>55</sup> The Court of Appeals stated that under its test, the government in *Dalehite* would have been liable under the Act had that accident occurred as a result of the negligent operation of the loading plan rather than as the result of a negligent decision in the planning stage.<sup>56</sup>

In *Hendry v. United States*<sup>57</sup> the Second Circuit added sev-

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that the distinction was difficult to make and had no support in the legislative history. *Id.* at 67-68.

<sup>50</sup> 221 F.2d 62 (D.C. Cir. 1955) (per curiam) (holding government liable for negligence leading to mid-air collision), *aff'd sub nom.* *United States v. Union Trust Co.*, 350 U.S. 907 (1955).

<sup>51</sup> *Id.* at 76-78.

<sup>52</sup> *Id.* at 76-77. The D.C. Circuit noted that in *Dalehite* the Supreme Court carefully established that each alleged act of negligence resulted directly from the Cabinet plan for the production of the chemical. *Id.* Based on this, the court in *Eastern Airlines* found that discretion was exercised when the government decided to operate the tower, but tower personnel had no discretion to operate it negligently. *Id.* at 77.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 78.

<sup>55</sup> *Id.* at 64-66.

<sup>56</sup> *Id.* at 77.

<sup>57</sup> 418 F.2d 774 (2d Cir. 1969) (holding U.S. liable for negligent withholding of

eral factors to the *Eastern Airlines* analysis for distinguishing decisions made at the planning level from those made at the operational level.<sup>58</sup> These factors included whether the decision required a balancing test without reliance on ascertainable standards, whether the decision involved the adoption of general principles or merely their application, and the level at which the decision was made.<sup>59</sup> The court suggested that guidance may be offered as to whether discretion exists by looking closely at the statute and its descriptions of the duties and functions of the agency and its agents.<sup>60</sup> The court also focused on whether the claimant attacked the premise of a rule or the way in which it was implemented.<sup>61</sup> In addition, the court considered whether the claimant's attack raised political issues, which would be nonjusticiable.<sup>62</sup> The court in *Hendry*, relying on *Dalehite*, articulated the general principle that the discretionary function exception applies when a claimant attacks the nature of federal rules but does not apply when the claimant challenges the application of those rules.<sup>63</sup>

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officer's license by Coast Guard officials based on negligent determination by public health service psychiatrists that officer was unfit for duty). The court in *Hendry* found that doctors did not have the statutory authority to withhold licenses for public safety reasons and have the limited discretion of a physician in private practice. *Id.* See also *White v. United States*, 317 F.2d 17, 26 (4th Cir. 1963) (finding discretionary function exception does not protect negligent decision to allow psychiatric patient freedom of movement resulting in suicide); *Friedland v. United States*, 209 F. Supp. 684, 685 (D. Mass. 1962) (holding that discretionary function exception does not protect decision to release patient from psychiatric institution where Veterans Administration regulations did not provide discretion to negligently allow freedom to patients); *Ruffino v. United States*, 126 F. Supp. 132, 135 (S.D.N.Y. 1954) (holding that discretionary function exception does not shield negligent administration of insulin).

<sup>58</sup> 418 F.2d at 782-83.

<sup>59</sup> *Id.* According to these standards, courts would view a professional expert evaluation as nondiscretionary and a government decision involving the balancing of cost, purpose, and feasibility as discretionary. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 782.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 782-83. See also *Dalehite v. United States*, 346 U.S. 15, 40, 42 (1953) (establishing foundation for standards to assess whether to allow discretionary function exception as defense to government negligence); *Blessing v. United*



This series of cases indicates that the decisions of federal agencies regarding inspection methods should be viewed as discretionary and, therefore, protected by the discretionary function exception.<sup>64</sup> These cases also suggest that the United States should be held liable for negligent inspection once the inspection policy has been established.<sup>65</sup> The FTCA litigation prior to *Varig* established the planning/operation distinction as the determinative test for application of the discretionary function exception.<sup>66</sup>

### III: FAA INSPECTION AND CERTIFICATION

The Court in *Varig* closely analyzed the inspection and

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States, 447 F. Supp. 1160, 1176 (E.D. Pa. 1978) (finding that nature of act and not status of actor governs planning/operational analysis).

<sup>64</sup> See *Indian Towing & Co. v. United States*, 350 U.S. 61, 64-66 (1955) (clarifying *Dalehite*); *Dalehite v. United States*, 346 U.S. 15, 36-42 (1953) (interpreting the discretionary function exception); *Hendry v. United States*, 418 F.2d 774, 782-83 (2d Cir. 1969) (developing factors to distinguish planning level from policy level); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75-78 (D.C. Cir. 1955) (per curiam) (adding specific standards to planning/operational distinction), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955).

<sup>65</sup> See *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75-79 (D.C. Cir. 1955) (per curiam) (applying planning/operation distinction to negligence of air traffic controller), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955).

<sup>66</sup> See *Tompkins, Negligent Certification*, *supra* note 9, at 594 (arguing that planning/operation distinction is the standard mode of analysis in FTCA actions involving the discretionary function exception). See, e.g., *Miller v. United States*, 583 F.2d 857, 866 (6th Cir. 1978) (finding United States negligence in supervision of flood gates operational); *Driscoll v. United States*, 525 F.2d 136, 139 (9th Cir. 1975) (finding negligent design of crosswalk warning operational); *Downs v. United States*, 522 F.2d 990, 995 (6th Cir. 1975) (holding United States liable for FBI's negligent handling of aircraft hijacking and finding negligence operational); *Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) (holding U.S. liable for negligent inspection of vaccine); *Stork v. United States*, 430 F.2d 1104, 1107 (9th Cir. 1970) (finding control tower negligence operational); *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969) (holding United States liable for negligent licensing of ship officer); *United States v. Furumizo*, 381 F.2d 965, 968 (9th Cir. 1967) (finding air traffic controller negligence operational); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 70 (D.C. Cir. 1955) (holding United States liable for operational air traffic controller negligence), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955) (per curiam); *Hoffman v. United States*, 398 F. Supp. 530, 535 (E.D. Mich. 1975) (concerning negligent air safety regulation).

certification process.<sup>67</sup> As a result, it is essential to understand the FAA's inspection and certification process prior to examining the Court's decision in *Varig*.<sup>68</sup> The Federal Aviation Act of 1958<sup>69</sup> directs the Secretary of Transportation to promote flight safety by establishing minimum standards governing the designs, materials, construction, and performance of aircraft.<sup>70</sup> Congress has also granted the Secretary the discretion to prescribe regulations governing the inspection of aircraft, including the manner in which such inspections should be made.<sup>71</sup> Consistent with those duties and powers, the Administrator of the FAA issues certificates for aircraft and component parts and requires the manufacturers and modifiers of aircraft to fulfill certification requirements prior to issuing a certificate.<sup>72</sup>

To accomplish these goals, the Administrator established a multistep certification process to monitor the avi-

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<sup>67</sup> 104 S. Ct. at 2765-68 (finding supplemental type certification process and type certification process highly similar). *See also* Petition for Rehearing at 2, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984) (contending that Court misconstrued certification process in *United Scottish*).

<sup>68</sup> *See* Dombroff, *Certification and Inspection: An Overview of Government Liability*, 47 J. AIR L. & COM. 229, 237 (1982) (discussing certification and inspection process) [hereinafter cited as Dombroff, *Certification and Inspection*].

<sup>69</sup> The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 (1982) [hereinafter cited as 1958 Act]. The Federal Aviation Agency was renamed the Federal Aviation Administration and placed under the Department of Transportation pursuant to the Department of Transportation Act, Pub. L. No. 89-670, § 48, 80 Stat. 931, 932 (1966) (current version of 49 U.S.C. § 1655 (1982)). When the type certificate for the Boeing 707 owned by Varig was issued, the Civil Aeronautics Act of 1938 was the governing statute. *See* Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938). The Supreme Court, for convenience, referred to the 1958 Federal Aviation Act because the relevant provisions of the 1958 Act are virtually identical to those of its predecessor. *Varig Airlines*, 104 S. Ct. at 2760.

<sup>70</sup> 1958 Act § 1421(a)(1) provides:

The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines and propellers as may be required in the interest of safety.

*Id.*

<sup>71</sup> 1958 Act § 1421(a)(3).

<sup>72</sup> *Id.* § 1423. The Administrator is the chief officer of the FAA. *Id.*

ation industry's compliance with the requirements promulgated by the Secretary of Transportation.<sup>73</sup> The FAA, acting as the Secretary's designee, has developed a comprehensive set of regulations delineating the minimum safety standards that designers and manufacturers must comply with before marketing their aircraft.<sup>74</sup> The FAA evaluates the basic design of an aircraft in "type certification," the first stage of the FAA compliance review.<sup>75</sup> To evaluate the plans, FAA employees or designated employees of the manufacturer review data submitted by the applicant and make spot checks to assess compliance with the regulations.<sup>76</sup> The manufacturer's record of compliance determines the extent of the FAA's inspection.<sup>77</sup> If the FAA finds that the proposed aircraft design meets the minimum safety standards, it issues a type certificate.<sup>78</sup> Once the type certificate is issued and a prototype is produced that meets FAA standards, the FAA issues a "production certificate," which authorizes the manufacturer to produce duplicate aircraft.<sup>79</sup>

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<sup>73</sup> See 14 C.F.R. pts. 23, 25, 27, 29, 31, 33, and 35 (1985) (delineating the certification process).

<sup>74</sup> *Id.* See generally Krause & Cook, *The Liability of the United States for Negligent Inspection*, 48 J. AIR L. & COM. 725, 730-34 (1983) (discussing certification process).

<sup>75</sup> 14 C.F.R. § 21.15 (1985). "Type certificate" specifies the make and the basic model of an aircraft, the operating limitations, the applicable regulations with which the FAA records compliance, and any other conditions prescribed for the aircraft. *Id.* §§ 21.21-21.41.

<sup>76</sup> 1958 Act § 1355 (1982). This provision authorizes the Secretary to delegate certain inspection and certification responsibilities to qualified private persons. See 14 C.F.R. § 183.29 (1985). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design. NATIONAL RESEARCH COUNCIL, COMMITTEE ON FAA AIRWORTHINESS CERTIFICATION PROCEDURES, IMPROVING AIRCRAFT SAFETY 29 (1980) [hereinafter cited as IMPROVING AIRCRAFT SAFETY]. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft in the certification process. See 14 C.F.R. § 183.1 (1984).

<sup>77</sup> See FEDERAL AVIATION ADMINISTRATION, FAA ORDER TYPE CERTIFICATION 31-32 (reprint 1967) (discussing spot check criteria).

<sup>78</sup> 14 C.F.R. § 21.21 (1985). One major manufacturer of commercial aircraft estimates that in the course of obtaining a type certificate, an aircraft manufacturer will submit approximately three hundred thousand drawings and changes to the FAA. See IMPROVING AIRCRAFT SAFETY, *supra* note 76, at 29-30.

<sup>79</sup> 49 U.S.C. § 1423(b) (1982). To obtain a production certificate, the manu-

Prior to placing an aircraft in service, the owner of the aircraft must obtain an "airworthiness certificate," which indicates that the aircraft conforms to the type certificate and is in good condition.<sup>80</sup> A "supplemental type certificate" must be obtained if a major modification or substantial change is contemplated in an aircraft.<sup>81</sup> A review of plans for proposed modifications and a complete conformance inspection following the performance of the work involved determines the approval of a supplemental type certificate.<sup>82</sup> For certain types of modifications, such as the installation of a new heater unit, the FAA is required to physically inspect the alteration.<sup>83</sup>

#### IV. FACTUAL SETTING

##### A. *United States v. Varig Airlines*

On July 11, 1973, a fire developed in the aft lavatory of a commercial jet owned by Varig Airlines that was enroute from Rio de Janeiro to Paris.<sup>84</sup> Although the crew managed to land the jet, 124 of the 135 persons on board died from asphyxiation or the effects of toxic gases produced by the fire.<sup>85</sup> In addition, as a result of the fire, most of

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facturer must prove to the FAA that it has established and can maintain a quality control system to assure that each aircraft will meet the design provisions of the type certificate. 14 C.F.R. §§ 21.139 - 21.143 (1985).

<sup>80</sup> 49 U.S.C. § 1423(c) (1982). It is unlawful for any person to operate an aircraft in air commerce without a valid airworthiness certificate. *Id.* § 1430(a)(1) (1982).

<sup>81</sup> 14 C.F.R. § 21.113 (1985). An example of a modification requiring a supplemental type certification was the reconstruction of the gasoline heater unit in the *United Scottish* case. *United Scottish Ins. Co. v. United States*, No. CU 71-36 E, slip op. at 2 (S.D. Cal. Feb. 24, 1980), *aff'd*, 692 F.2d 1209 (9th Cir. 1982), *rev'd*, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984).

<sup>82</sup> 14 C.F.R. § 21.115 (1985). *See also* Petition for Rehearing at 3-4, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984) (arguing that inspection of heater was mandatory); *United Scottish Ins. Co. v. United States*, No. CV 71-36 E, slip op. at 25 (S.D. Cal. Feb. 24, 1980), *aff'd*, 692 F.2d 1209 (9th Cir. 1982), *rev'd*, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984).

<sup>83</sup> 14 C.F.R. § 21.115-.117 (1985). *See also* FEDERAL AVIATION ADMINISTRATION, FAA ORDER TYPE CERTIFICATION 31, 39 (reprint 1967).

<sup>84</sup> *Varig*, 104 S. Ct. at 2758. Varig Airlines is a commercial Brazilian air carrier. *Id.* at 2758.

<sup>85</sup> 104 S. Ct. at 2758.

the aircraft was destroyed.<sup>86</sup> The aircraft involved was a Boeing 707 jet.<sup>87</sup> Seaboard Airlines purchased the jet from Boeing in 1958 and sold it in 1969 to Varig Airlines, which used the jet commercially until 1973.<sup>88</sup> The Civil Aeronautics Agency (CAA), the predecessor to the FAA, issued a type certificate for the Boeing 707 in 1958, certifying that the jet's designs and performance data conformed with minimum safety standards.<sup>89</sup>

Varig Airlines and the families of the passengers killed in the crash brought suit against the United States under the Federal Tort Claims Act for damages and wrongful death.<sup>90</sup> The plaintiffs asserted that the CAA had been negligent in inspecting the Boeing 707 and in issuing a type certificate to a class of aircraft that did not meet CAA fire protection standards.<sup>91</sup> The district court, applying the law of California,<sup>92</sup> granted summary judgment for the United States on the ground that California law does not recognize a duty actionable in tort for inspection and certification.<sup>93</sup> The district court also found that, even if the plaintiffs had presented an action in tort, recovery was barred by two exceptions to the FTCA: the discretionary

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2758.

<sup>89</sup> *Id.* See *supra* note 75 for a review of type certification.

<sup>90</sup> *Id.* Because the accident occurred in France, the official accident investigation came under the jurisdiction of a French Commission of Inquiry, which worked in conjunction with a National Transportation Safety Board investigator. Brief for Varig Airlines in Opposition to Petition for a Writ of Certiorari at 2, *Varig*, 104 S. Ct. at 2755.

<sup>91</sup> 104 S. Ct. at 2758 (1984). The plaintiffs in *Varig* asserted that the fire originated in the towel disposal area, located below the sink unit in one of the lavatories, and alleged that the towel disposal area was incapable of containing fire. *Id.* The plaintiffs emphasized air safety regulations requiring that waste receptacles be made of fire-resistant materials and incorporate other mechanisms for containing possible fires. *Id.* See also 14 C.F.R. § 4b.381(d) (1984) (discussing requirements for installation of waste receptacles).

<sup>92</sup> The FTCA requires that courts apply the substantive tort law of the jurisdiction in assessing the relative liabilities of the parties involved in an accident.

<sup>93</sup> *Varig Airlines v. United States*, 16 Av. Cas. (CCH) 17,577, 17,586-89 (C.D. Cal. May 12, 1981) (noting that under FTCA plaintiff must raise claim that is valid under law of state of claim), *aff'd*, 692 F.2d 1205 (9th Cir. 1982), *rev'd*, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984).

function exception<sup>94</sup> and the misrepresentation exception.<sup>95</sup>

The United States Court of Appeals for the Ninth Circuit reversed the district court.<sup>96</sup> The Ninth Circuit decided that a private person inspecting and certifying for airworthiness would be liable under the California "Good Samaritan" rule and concluded that the United States should be judged by the same standard.<sup>97</sup> The Court of Appeals rejected the government's argument that the plaintiffs' actions were barred by the misrepresentation exception.<sup>98</sup> In addition, the court rejected the discre-

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<sup>94</sup> FTCA § 2680(a) (1982). Section 2680 (a) states as follows:

The provisions of this chapter and section 1346(b) of this Title shall not apply to: Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not such discretion involved be abused.

*Id.*

<sup>95</sup> The misrepresentation exception provides that the United States is not subject to liability for any claim arising out of a misrepresentation in a certificate. *Id.* § 2680(h) (stating that provisions of FTCA shall not apply to any claims arising out of a misrepresentation). See also RESTATEMENT (SECOND) OF TORTS § 311 (1977) (defining tort of negligent misrepresentation as negligently giving false information to another leading to reliance on information resulting in harm). In *Varig*, the Court decided not to consider the misrepresentation exception. *Varig Airlines*, 104 S. Ct. at 2766.

<sup>96</sup> *Varig Airlines v. United States*, 692 F.2d 1205, 1209 (9th Cir. 1982) (finding U.S. liable for negligence in certifying Boeing 707), *rev'd*, 104 S. Ct. 2755 (1984).

<sup>97</sup> *Id.* at 1212-20. The court found that aircraft purchasers rely on the FAA's certification process in purchasing aircraft, and passengers rely on that process for flight safety. *Id.* at 1208. Although members of the flying public may not know the specific contents of the FAA regulations, they are aware, in general, that safety regulations exist and that the United States checks aircraft for compliance. *Id.* The United States should expect that members of the public will rely on proper performance by the FAA of its duty to inspect and certificate. *Id.*

<sup>98</sup> *Id.* at 1215. The court interpreted the plaintiff's claims as arising from negligence and not misrepresentation. *Id.* The Supreme Court's decision not to consider the misrepresentation defense may reflect the fact that courts have not entertained the defense when the claim primarily sounds in negligence. See, e.g., *Murray v. United States*, 327 F. Supp. 825, 835 (D. Utah 1971) (finding faulty design of aeronautical chart a negligent act not misrepresentation). See also *Neal v. Bergland*, 646 F.2d 1178, 1183-84 (6th Cir. 1981) (holding misrepresentation exception inapplicable to negligent certification of home); *Ware v. United States*,

tionary function exception defense and found that there was no discretion available to the FAA inspector to ignore safety violations.<sup>99</sup> The Supreme Court granted certiorari in *Varig*<sup>100</sup> to determine whether the United States could be held liable under the FTCA for the FAA's negligent certification of aircraft.<sup>101</sup>

#### B. *United States v. United Scottish Insurance Co.*

A review of the facts of *United Scottish*,<sup>102</sup> the case joined with *Varig*,<sup>103</sup> is crucial in order to understand and analyze the difference between *Varig* and *United Scottish*. In *Varig*, the FAA decided not to inspect the aircraft lavatory.<sup>104</sup> In *United Scottish*, however, the FAA actually inspected the aircraft's heater.<sup>105</sup> The Supreme Court may have extended the discretionary function exception to negligent inspection because it did not discuss these differences.<sup>106</sup>

In *United Scottish*, a DeHavilland Dove aircraft used in the operation of an air taxi service caught fire in midair,

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626 F.2d 1278, 1283 (5th Cir. 1980) (finding misrepresentation exception not a bar to claim arising from misdiagnosis of illness in cattle); *In re Air Crash Disaster near Silver Plume, Colo.*, 445 F. Supp. 384, 409 (D. Kan. 1977) (holding misrepresentation exception not bar to action for negligent certification of airplane). See generally Iser, *Government Liability for Negligent Airworthiness Certification*, 31 HASTINGS L. J. 247, 268 (1979) (discussing misrepresentation exception and noting that it has not been successful defense to claims of government negligence).

<sup>99</sup> 692 F.2d at 1208-09. The Ninth Circuit, citing *Dalehite*, construed the discretionary function exception as primarily precluding suits arising from decisions of administrators or executives. *Id.* The court concluded that the duties undertaken by the FAA inspectors are more like those of the lighthouse keepers in *Indian Towing* than those of the Cabinet-level Secretaries in *Dalehite*. *Id.* at 1209.

<sup>100</sup> 461 U.S. 925 (1984).

<sup>101</sup> *Id.*

<sup>102</sup> 104 S. Ct. at 2755.

<sup>103</sup> *United Scottish Ins. Co. v. United States*, No. CV 71-36 E, slip op. at 2 (S.D. Cal. Feb. 24, 1980), *aff'd*, 692 F.2d 1209 (9th Cir. 1982), *rev'd*, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984).

<sup>104</sup> *Varig*, 16 Av. Case (CCH) at 17,585-87.

<sup>105</sup> No. CV 71-36 E, slip op. at 6. See also Petition for Rehearing at 2, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984).

<sup>106</sup> *Varig*, 104 S. Ct. at 2766 (finding that Congress did not intend to permit U.S. liability for inspection and certification by regulatory agencies). See also Hatfield, *View from Justice*, *supra* note 17, at 5 (arguing that Supreme Court extended discretionary function exception to negligent certification in *Varig*).

crashed and burned near Las Vegas, Nevada.<sup>107</sup> The pilot, copilot, and two passengers were killed.<sup>108</sup> The cause of the crash was an in-flight fire in the forward baggage compartment of the aircraft.<sup>109</sup> Air Wisconsin purchased the DeHavilland Dove in 1951.<sup>110</sup> In 1965, Aerodyne Engineering Corporation installed a gasoline cabin heater in the airplane.<sup>111</sup> The FAA inspected the installation and granted Air Wisconsin a supplemental type certificate.<sup>112</sup> In 1966, Dowdle, an air taxi operator, purchased the DeHavilland Dove from Air Wisconsin.<sup>113</sup> Dowdle's insurance company, United Scottish, brought an action for wrongful death and property damage after the aircraft crashed.<sup>114</sup> The district court found that the crash resulted from defects in the installation of the gasoline lines to the cabin heater and concluded that the installation did not comply with FAA regulations.<sup>115</sup> The court held the government liable for the FAA's negligence in certifying an installation that did not comply with safety regulations.<sup>116</sup>

The Ninth Circuit reversed and remanded the case to the district court to consider whether California's Good Samaritan law would impose a duty on the government to

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<sup>107</sup> *United Scottish Ins. Co.*, CV 71-36E, slip op. at 2. A DeHavilland Dove is a twin engine propeller airplane seating eight to ten passengers and two crew members. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The fire was caused by a faulty fuel line leading to the gasoline heater. *Id.* at 7.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *Id.* Aerodyne also installed defective gasoline lines and defective couplings, resulting in the explosion. *Id.*

<sup>112</sup> *Id.* See *supra* note 77 and accompanying text (reviewing district courts finding that heater was inspected).

<sup>113</sup> *United Scottish Ins. Co.*, CV 71-36E, slip op. at 20.

<sup>114</sup> *Id.* at 15. The plaintiffs alleged that the FAA negligently inspected the heater installation. *Id.*

<sup>115</sup> *Id.* at 23. The court found that the installation did not comply with FAA regulations that specify the amount of vibration that an installation must withstand. *Id.*

<sup>116</sup> *Id.* at 9. The district court cited the FAA's negligence as the proximate cause of the accident. *Id.*



properly inspect.<sup>117</sup> The court of appeals also asked the district court to determine whether a negligently issued certificate constituted a breach of the FAA's duty to properly inspect.<sup>118</sup> On remand, the district court found for the plaintiffs, ruling that the California Good Samaritan rule established liability under these facts.<sup>119</sup> The Ninth Circuit affirmed the judgment of the district court, finding that careful performance of aircraft inspections is the essence of the government's duty once the inspections are undertaken.<sup>120</sup>

*Varig* and *United Scottish* were not based on similar claims.<sup>121</sup> The crucial difference between the two cases is that *Varig* involved a decision not to inspect,<sup>122</sup> whereas *United Scottish* involved a mandatory inspection that was negligently implemented at the operational level.<sup>123</sup> The

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<sup>117</sup> *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 198-99 (9th Cir. 1979), *rev'd sub nom.* *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984).

<sup>118</sup> *Id.*

<sup>119</sup> *United Scottish Ins. Co.*, CV 71-36E, slip op. at 21. *See, e.g.*, *Coffee v. McDonnell-Douglas Corp.*, 503 P.2d 1366 (Cal. 1972) (holding employer liable for damages resulting from failure to discover disease in the course of pre-employment physical examination); *Schwartz v. Helms Bakery*, 430 P.2d 68 (Cal. 1968) (finding defendant actionable based on Good Samaritan principle).

<sup>120</sup> *Varig*, 692 F.2d at 1212. The Ninth Circuit reasoned that FAA officials enforce the FAA's requirements by inspecting aircraft, but cannot in any way change or waive safety requirements. *Id.* at 1209. The court found that inspection, a discretionary function, was not performed. *Id.*

<sup>121</sup> *See* Petition for Rehearing at 2-3, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984) (arguing that *United Scottish* involved negligent inspection while *Varig* involved negligent decision not to inspect).

<sup>122</sup> *Varig Airlines*, 16 Av. Case (CCH) at 17,582.

<sup>123</sup> *United Scottish Ins. Co.*, CV 71-36E, slip op. at 25 (finding inspection of heater was mandatory and was actually carried out by FAA). The district court noted that:

The Federal Aviation Administration and the Federal Aviation Regulations require the aircraft herein to be inspected by the Federal Aviation Administration personnel after the installation of the heater in 1965 to determine its airworthiness as modified . . . Federal Aviation Administration regulations in effect in 1965 required that a Federal Aviation Administration inspector, or a designated General Aviation District Office Inspector (also an FAA employee) physically inspect the combustion heater installation prior to the approval of the supplemental type certificate or its revision before the supplemental type certificate could be approved.

Court held that the discretionary function exception barred the Government from liability for its negligence in both *Varig* and *United Scottish*.<sup>124</sup> The United States, in its brief on first appeal to the Ninth Circuit, admitted that the inspection was mandatory. The brief stated: "Due to the nature of the installation, the [FAA's] regulations required that a supplemental type certificate be obtained from the FAA to cover the heater and an FAA inspection was required prior to the issuance of the supplemental type certificate."<sup>125</sup> The Ninth Circuit noted that "FAA regulations, 14 C.F.R. Part 21.E required that Aerodyne [the operator of the aircraft] acquire a Supplemental Type Certificate (STC) from the FAA for this type of installation. The parties agree that FAA regulations also required that the FAA inspect the installation prior to giving its approval for issuance of the (STC)."<sup>126</sup> The Court held that the discretionary function exception protected the government from liability in both *Varig* and *United Scottish*.<sup>127</sup>

#### V: THE *VARIG* DECISION

##### A. *Review of the Supreme Court Opinion: The Regulatory/Nonregulatory Distinction*

In *Varig*, the Supreme Court held that the discretionary function exception extended to all negligent acts of the FAA in inspecting and certifying aircraft.<sup>128</sup> The rationale

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<sup>124</sup> *Varig*, 104 S. Ct. at 2755.

<sup>125</sup> Brief for the United States at 5, *United Scottish Ins. Co. v. United States*, 614 F.2d 188 (9th Cir. 1979), *rev'd sub nom. United States v. Varig Airlines*, 104 S. Ct. 2755 (1984).

<sup>126</sup> *Id.* at 190.

<sup>127</sup> *Id.*

<sup>128</sup> 104 S. Ct. at 2764-69 (1984) (finding that Congress intended to extend discretionary function exception to negligence of federal agencies). *See also* *Natural Gas Pipeline Co. v. United States*, 742 F.2d 502, 509 (9th Cir. 1984) (holding that *Varig* extended inspection); *Proctor v. United States*, No. CV 83-3415, slip op. at 3, (C.D. Cal. Aug. 22, 1984) (finding *Varig* extended discretionary function exception to operational negligence). For an argument against holding the U.S. liable for negligent certification, *see* Hatfield, *The Non-Liability of the Government for Certification of Aircraft*, 17 *FORUM* 602, 607 (1982) (arguing that allowing recovery for negligent certification would make U.S. an insurer of air travel). *But see* *Tompkins*,

for this decision was that Congress did not intend to permit actions against the United States for negligent enforcement of private industries' compliance with federal regulations.<sup>129</sup> The Court also found that holding the United States liable in *Varig* would make the United States an insurer of air transportation.<sup>130</sup>

The Court interpreted its previous decision in *Dalehite* to extend the discretionary function exception to operational acts.<sup>131</sup> Chief Justice Burger, writing for the Court, limited his discussion of *Dalehite* to a quote from the opinion that suggested that the discretionary function exception extends beyond the acts of top administrators.<sup>132</sup> Chief Justice Burger summarily concluded that after *Dalehite*, it is unnecessary to define the precise contours of the discretionary function exception.<sup>133</sup> Instead, courts should review the legislative history of the FTCA to infer whether Congress intended to cover the category of federal acts involved in a particular case.<sup>134</sup> The Court, in effect, created a regulatory/nonregulatory distinction that applies the discretionary function exception to the negligent operational acts of regulatory agencies.<sup>135</sup>

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*Negligent Certification*, *supra* note 9 at 570-71 (arguing that U.S. should be liable for negligent certification because of high level of public reliance on FAA for protecting safety).

<sup>129</sup> *Varig*, 104 S. Ct. at 2763-69. The Court implied that holding the U.S. liable for negligent inspection would be inconsistent with the distribution of duties between the FAA and aircraft manufacturers. *Id.* The Court emphasized that the manufacturer is primarily responsible for complying with federal regulation and found that the FAA merely polices compliance. *Id.*

<sup>130</sup> *Id.* at 2769.

<sup>131</sup> *Id.* at 2763-65 (finding that *Dalehite* stood for principle that discretionary function exception extends to all employees exercising discretion).

<sup>132</sup> *Id.* at 2765. The Court quoted the section from *Dalehite* stating that "acts of subordinates in carrying out operations of government in accordance with official direction cannot be actionable." *Id.* (quoting *Dalehite v. United States*, 346 U.S. 15, 33 (1953)).

<sup>133</sup> *Varig*, 104 S. Ct. at 2765 (1984). This conclusion from *Dalehite* is arguably dicta in light of the fact that the Court in *Dalehite* found that the discretionary function exception protects the "acts of administrators." *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953).

<sup>134</sup> 104 S.Ct. 2755, 2762-64 (1984).

<sup>135</sup> *Id.* at 2764-65 (emphasizing finding that Congress did not intend for regulatory agencies to be held liable under FTCA). See also *Seagram and Sons, Inc. v.*

In addition to adopting the broad view of *Dalehite*, the Court dismissed the planning/operation distinction by rejecting *Indian Towing* as irrelevant.<sup>136</sup> The Court emphasized the fact that the discretionary function exception was not relied on in *Indian Towing* as a defense to the allegation of government negligence.<sup>137</sup> In rejecting this precedent, the Court also dismissed the significant *Indian Towing* principle that once the United States assumes a duty, it will be held liable for negligence in carrying out that duty.<sup>138</sup> The Court de-emphasized *Eastern Airlines* as well, because the court in *Eastern Airlines* relied on *Indian Towing*.<sup>139</sup> The Court, through its rejection of *Eastern Airlines*, indicated its dissatisfaction with the cases that developed the planning/operation distinction.<sup>140</sup>

The Supreme Court articulated three broad principles from its review of the legislative history and relevant

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United States, No. 82-900-C, slip op. at 13 (S.D. Ind. Jan. 9, 1985) (citing *United States v. Varig Airlines*, 104 S. Ct. at 2764); *General Public Utilities Corp. v. United States*, 745 F.2d 239, 242 (3d Cir. 1984).

<sup>136</sup> *Id.* at 2764.

<sup>137</sup> *Id.* at 2764. Although the United States did not rely on the discretionary function exception in *Indian Towing*, the issues discussed in relation to the government's claim in that case bear directly on the discretionary function exception. *Indian Towing v. United States*, 350 U.S. 61, 68 (1955). The government in *Indian Towing* argued that the FTCA contained an implied exception from liability for "uniquely government functions." *Id.* In *Varig*, the Supreme Court noted that the *Indian Towing* decision rejected the government's "unique government function" assertion, reasoning that it would require courts to consider a governmental and nongovernmental distinction, which is difficult to ascertain. 104 S. Ct. at 2764 (1984). That holding could require the courts to determine in each case, whether the activity is found in the private sector or is uniquely a government function. *Id.*

<sup>138</sup> 104 S. Ct. at 2764. See *Indian Towing v. United States*, 350 U.S. 61, 69 (1955) (developing principle that once U.S. assumes duty it must implement duty without negligence).

<sup>139</sup> 104 S. Ct. 2755, 2764-65 (1984). Although the court in *Eastern Airlines* relied on *Indian Towing*, it articulated standards for the planning/operation distinction. See *supra* note 48b (discussing standards for planning/operation distinction).

<sup>140</sup> See generally *Petition for Rehearing* at 2, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (contending that Supreme Court neglected planning/operation distinction). The Court also rejected the plaintiff's reliance on *Rayonier v. United States* as equally misplaced. *Varig*, 104 S. Ct. at 2756-65. See *Rayonier v. United States*, 352 U.S. 315, 320 (1957) (finding U.S. liable for negligence in controlling fire).

cases.<sup>141</sup> First, "the nature of the conduct, rather than the status of the actor, governs whether the discretionary function exception applies in a given case."<sup>142</sup> Second, "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee . . . are of the nature and quality that Congress intended to shield from tort liability."<sup>143</sup> Third, the discretionary function exception encompasses all discretionary acts of government when it regulates the conduct of private individuals.<sup>144</sup> Based on these conclusions, the Court considered whether the discretionary function exception immunized the FAA from tort liability for the inspection and certification involved in *Varig*.<sup>145</sup>

The Court in *Varig* focused exclusively on the issue of negligent certification and concluded that neither the Boeing 707 nor the DeHavilland Dove cabin heater was actually inspected.<sup>146</sup> These cases, the Court decided, were based on alleged negligence in the failure of the FAA to inspect these aircraft in the process of certification.<sup>147</sup> The Court, as a result, did not address issues re-

<sup>141</sup> *Varig*, 104 S. Ct. at 2765.

<sup>142</sup> *Id.* The Court relied on *Dalehite* for this principle. See *Dalehite v. United States*, 346 U.S. 15, 33 (1953).

<sup>143</sup> *Varig*, 104 S. Ct. at 2765 (emphasizing Congress' intent to focus on acts).

<sup>144</sup> *Id.* But see *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28-33 (1942) (statement of Assistant Attorney General Francis M. Shea) (noting that discretionary function exception should not protect ordinary torts committed by regulatory agencies).

<sup>145</sup> *Varig*, 104 S. Ct. at 2765 (1984).

<sup>146</sup> *Id.* at 2765-66. The Court stated that this conclusion reflected the district court's finding. *Id.* The district court, however, found the opposite. *United Scottish Ins. Co. v. United States*, No. CV 71-36E, slip op. at 7 (S.D. Cal. Feb. 24, 1980) (finding that FAA inspected heater in DeHavilland Dove), *aff'd*, 692 F.2d 1209 (9th Cir. 1982), *rev'd sub nom.* *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984).

<sup>147</sup> 104 S. Ct. at 2765. Although the Court focused on negligence at the planning level, its language and holding indicated that it addressed operational negligence. See also *Natural Gas Pipeline Co. v. United States*, 742 F.2d 502, 504 (9th Cir. 1984) (holding that *Varig* extends discretionary function exception to negligent inspection); *Proctor v. United States*, No. CV 83-3415, slip op. at 3, (C.D. Cal. Aug. 22, 1984) (finding *Varig* extended discretionary function exception to operational negligence).

lating to an actual inspection that was negligently performed.

Chief Justice Burger reviewed the spot check system, used by the FAA to decide on those parts of an aircraft to inspect during certification.<sup>148</sup> The Court found that decisions concerning what to inspect were based on a variety of factors, such as the manufacturer's compliance record and its experience in production.<sup>149</sup> The spot check system, the Court concluded, was within the protection of the discretionary function exception.<sup>150</sup> The Court, in making this decision, found that decisions of the engineers and inspectors regarding the extent of inspection involved statutorily granted discretion.<sup>151</sup> Based on these conclusions, the Supreme Court reversed the Ninth Circuit and held that the actions against the FAA for its negligence in certifying aircraft were barred by the discretionary function exception.<sup>152</sup>

The United Scottish Insurance Company ("USIC") argued that it was unclear whether the Supreme Court extended the discretionary function exception to negligent inspection in *Varig*.<sup>153</sup> The sources of confusion were the Court's initial finding that both the *Varig* and *United Scot-*

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<sup>148</sup> 104 S. Ct. at 2767 (reviewing spot-check system). See FEDERAL AVIATION ADMINISTRATION FAA ORDER TYPE CERTIFICATION at 31-32 (reprint 1967) (discussing spot-check procedures and criteria).

<sup>149</sup> 104 S. Ct. at 2767. The Court found that inspectors took "risks" during inspection that were pursuant to a statutory grant of authority. *Id.* But see FEDERAL AVIATION ADMINISTRATION FAA ORDER TYPE CERTIFICATION, at 32 (reprint 1967) (suggesting limited discretion available to engineer but not to inspector).

<sup>150</sup> 104 S. Ct. at 2768.

<sup>151</sup> *Id.* (finding that the Federal Aviation Administration exercises basic type of discretion when it determines extent to which it supervises safety procedures of private individuals).

<sup>152</sup> *Id.* at 2769. The Court concluded that Congress did not intend to allow liability for regulatory enforcement activities. *Id.*

<sup>153</sup> See generally Hatfield, *View from Justice*, *supra* note 14, at 5-7 (arguing that *Varig* extends discretionary function exception to negligent certification). See also *Natural Gas Pipeline Co. v. United States*, 742 F.2d 502, 509 (9th Cir. 1984) (holding that *Varig* extends discretionary function exception to negligent inspection); *Proctor v. United States*, No. CV 83-3415, slip op. at 3, (C.D. Cal. Aug. 22, 1984) (finding *Varig* extended discretionary function exception to operational negligence).

*tish* cases were based on decisions not to inspect, and the language of the decision that strongly suggested that the Court was extending the discretionary function exception to negligent inspection.<sup>154</sup> USIC petitioned the Supreme Court for a rehearing, claiming that the Court misinterpreted the facts of *United Scottish*.<sup>155</sup> In its petition, United Scottish predicted that the Court's initial decision would result in confusion about the discretionary function exception.<sup>156</sup>

The insurance company first argued that the Court erred in treating its case as a claim based on a negligent decision not to inspect, rather than an actual negligent inspection.<sup>157</sup> In support of this assertion, USIC cited the district court's finding that an inspection of the heater was required by FAA regulations and that such an inspection had actually been made by the FAA.<sup>158</sup> The insurance company contended that, since the inspection was mandatory, it was not a discretionary act.<sup>159</sup> USIC also ar-

<sup>154</sup> 104 S. Ct. at 2767-78 (1984). See *supra* note 34 and accompanying text (discussing Court's finding that cases did not involve negligent inspection and language indicating that Court extended discretionary function exception to negligent inspection).

<sup>155</sup> Petition for Rehearing at 2, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (arguing that heater was actually inspected).

<sup>156</sup> *Id.* USIC argued that the Court needed to clarify its opinion in order to provide guidance to government agencies and the private bar. *Id.* at 5.

<sup>157</sup> *Id.* USIC did not contend that the Administrator of the FAA or any other person within the FAA who was imbued with discretion abused authority or misapplied discretion. *Id.* at 2. Rather, USIC argued that an inspector at the operational level negligently carried out the duties mandated by the FAA Administrator. *Id.*

<sup>158</sup> *Id.* at 2-3. See *supra* note 77 (discussing district court finding that FAA actually inspected modification of DeHavilland Dove). By regulation, the FAA has not made the applicant for a supplemental type certificate responsible for conducting all inspections and tests necessary to determine that the aircraft conforms with FAA airworthiness requirements, but instead has taken that responsibility upon itself. 14 C.F.R. pt. 21E (1984). USIC concluded that the Supreme Court's decision in *Varig* was incorrect in stating that the process to determine whether to grant a supplemental type certificate is the same as that used for type certification. Petition for Rehearing at 10, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984).

<sup>159</sup> Petition for Rehearing at 9, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984). USIC argued that there was no room for discretion for the inspector because federal regulations specified the materials which could be used for the heat-

gued that *Dalehite* did not apply to its case because *United Scottish* concerned negligence at the operational level rather than at the planning level.<sup>160</sup>

Relying on *Indian Towing*, United Scottish concluded that negligent certification where inspection is mandatory should lead to United States liability.<sup>161</sup> The insurance company premised this conclusion on the assertion that the inspector who negligently checked the heater had no discretion to negligently perform his duties, and that the discretionary function exception protects only acts or omissions where the government exercises statutorily granted discretion.<sup>162</sup> The Supreme Court denied the petition for a rehearing without issuing an opinion.<sup>163</sup>

### B. *Critical Analysis of Varig*

In *Varig*, the Court extended the limited legislative history of the FTCA and the Act's discretionary function exception and implied that Congress intended to protect all negligence of regulatory agencies from suit by private parties.<sup>164</sup> The Court did not adequately consider legislative history indicating Congress' desire to limit the discretionary function exception to protection of policy level decisions of regulatory agencies.<sup>165</sup> In addition, the

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ing line, the routing that was required, the vibration excursion which was permissible, and the type of clamping that was mandatory. *Id.*

<sup>160</sup> *Id.* at 6-8. USIC emphasized that the district court found that the heater was inspected. *Id.*

<sup>161</sup> *Id.* at 6. USIC stated, however, that the inspection decisions of the Administrator and lower level FAA employees are protected by the discretionary function exception, and that *Varig* was correctly decided on its facts. *Id.* at 8.

<sup>162</sup> *Id.* at 5. The government conceded that the discretionary function exception was not applicable to the facts of *United Scottish* in the district court. *United Scottish Ins. Co.*, No. CV 71-36E, slip op. at 9. The government stated that "[n]owhere on appeal has the United States argued that the discretionary function exception applies in the instant action." Reply Brief for the United States at 3, *Varig Airlines v. United States*, 614 F.2d 188 (9th Cir. 1979).

<sup>163</sup> *United States v. United Scottish Ins. Co.*, 105 S. Ct. 26 (1984).

<sup>164</sup> 104 S. Ct. at 2767. The Court concluded from the legislative history that the FAA has a statutory duty to promote safety in air transportation, but that it does not have a duty to ensure safety. *Id.* at 2768.

<sup>165</sup> See, HEARINGS ON H.R. 5373 AND H.R. 6463 BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant At-



Court's analysis of *Dalehite* and its progeny failed to consider the planning/operation distinction, which was important to the application of the discretionary function exception.<sup>166</sup>

In reviewing *Dalehite*, the Court quoted one excerpt from that case that states that acts of subordinates in carrying out official directions fall within the discretionary function exception.<sup>167</sup> The Court did not, however, refer to these subordinates as administrators, as the Court did in *Dalehite*.<sup>168</sup> Because the Court does not discuss the holding of *Dalehite* and only presents this one quote, it seems that the Court views the quoted section as the primary rationale of *Dalehite*.<sup>169</sup> The excerpt from *Dalehite*, taken out of context, does suggest a very broad application of the discretionary function exception.<sup>170</sup> The Court, however, neglected to consider the emphasis that it previously placed in *Dalehite* on establishing and highlighting the occurrence of negligence at the planning stage, rather than at the operational stage.<sup>171</sup> In addition, the Court failed to discuss the definition of discretionary acts of subordinates provided in *Dalehite*: "determinations

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torney General Francis M. Shea) (stating that common law torts of employees of regulatory agencies would be included within the scope of the bill). See, also H. R. 7263, 76th Cong., 1st Sess. § 303(7), 84 CONG. REC. 1,492 (1939) (providing that waiver of sovereign immunity should not extend to any claim for damages caused by implementation of laws by the Federal Trade Commission or Securities and Exchange Commission).

<sup>166</sup> See *Dalehite v. United States*, 346 U.S. 15, 40-42 (1953) (developing foundation of planning/operation distinction).

<sup>167</sup> *Id.*

<sup>168</sup> *Varig*, 104 S. Ct. at 2763-64 (1984). See *supra* note 132 (discussing Court's quotation from *Dalehite*).

<sup>169</sup> *Id.* 2762. Immediately after quoting this section of *Dalehite*, the Court stated that "the respondents insist that the view of § 2680(a) expressed in *Dalehite* has been eroded." *Id.* This statement indicates that the Court in *Varig* construed this quote as the rationale of *Dalehite*. *Id.* at 2769.

<sup>170</sup> *Id.* at 2764. Courts have construed *Dalehite* as extending the discretionary function exception to all negligent acts of regulatory agencies as well as limiting the discretionary function exception to negligent acts on the policy making level. See *Tompkins, Negligent Certification*, *supra* note 9, at 587 (discussing difficulties in application of *Dalehite*).

<sup>171</sup> See *Dalehite v. United States*, 346 U.S. 15, 42 (1953) (tracing accident back to Cabinet level plan).

made by executives or administrators in establishing plans, specifications, or schedules of operation are discretionary acts.”<sup>172</sup> This definition presents a far narrower view of the scope of the discretionary function exception than does the earlier text quoted and relied on in *Varig*.<sup>173</sup>

Chief Justice Burger’s omission of the planning-operation distinction in *Varig* is particularly surprising considering that the test has been applied in FTCA cases for thirty years.<sup>174</sup> The Court ignored the planning/operational principle articulated in *Indian Towing* and *Eastern Airlines*, which did not apply the discretionary function exception where the negligent operational level employee simply followed a direction from superiors.<sup>175</sup> The significant inquiry under the planning/operation standard developed in *Dalehite*, *Indian Towing*, and *Eastern Airlines* is whether the negligent government employee exercised statutorily granted discretion or merely personal discretion.<sup>176</sup> If the employee exercised statutorily granted discretion, the discretionary function exception applied, but if the employee used personal discretion, then the discretionary function exception would not protect the negligent act.<sup>177</sup>

The Supreme Court also failed to distinguish the facts

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<sup>172</sup> *Id.* at 34 (discussing legislative history).

<sup>173</sup> See *Blessing v. United States*, 447 F. Supp. 1160, 1168 (E.D. Pa. 1978) (discussing broad and narrow constructions of discretionary function exception in *Dalehite*).

<sup>174</sup> See Petition for Rehearing at 7-8, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (arguing that planning/operation distinction should be applied in *United Scottish*). See also *supra* note 29 (discussing cases employing planning-operational distinction).

<sup>175</sup> See *Dalehite v. United States*, 346 U.S. 15, 34 (1953) (developing planning/operation distinction). See also Petition for Rehearing at 6, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (arguing that Court ignored operational aspect of negligence).

<sup>176</sup> See *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 77-78 (D.C. Cir.) (per curiam) (noting that there was some individual discretion involved in activities of air traffic controllers but that discretion was not at policy-making level), *aff’d sub nom.* *United States v. Union Trust Co.*, 350 U.S. 907 (1955).

<sup>177</sup> See, e.g., *Indian Towing v. United States*, 350 U.S. 61, 65-67 (1955) (establishing standards for planning/operation distinction). See generally, *Tompkins, Negligent Certification*, *supra* note 9, at 594 (discussing planning/operation distinction). In *United Scottish*, the discretionary function exception should not have been applied because the inspector did not have statutorily granted discretion to inspect

of *Varig* from those of *United Scottish*.<sup>178</sup> The Court's finding that both *Varig* and *United Scottish* involved claims for negligent decisions not to inspect and the broad language of the opinion, established confusing precedent.<sup>179</sup> Leaving this problem unrectified, the Court denied USIC's petition for a rehearing.<sup>180</sup>

In addition to the Court's failure to distinguish between the facts of *Varig* and those of *Scottish*, the Court neglected to distinguish the type certification process in *Varig* from the supplemental type certification process in *United Scottish*.<sup>181</sup> The Court did not discuss both the finding of the district court in *United Scottish* that the heater was inspected and the concession by the government that inspection in these circumstances was mandatory.<sup>182</sup> The government would have been held liable in *United Scottish* if the Court had determined that a mandatory inspection duty existed.<sup>183</sup> There is considerable case law that holds the United States liable for the failure of its employees to carry out a mandatory inspection.<sup>184</sup>

## VI: THE IMPLICATIONS OF *VARIG*

The broadly worded decision in *Varig*, read in conjunc-

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the aircraft. See petition for Rehearing at 4-7, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984).

<sup>178</sup> Petition for Rehearing at 3-6, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (arguing that Supreme Court misconstrued facts of the case).

<sup>179</sup> *Id.* at 2. See *infra* notes 185-187 (confusion that still exists regarding the discretionary function exception following the Supreme Court's decision in *Varig*).

<sup>180</sup> *United States v. United Scottish Ins. Co.*, 105 S. Ct. 26 (1984).

<sup>181</sup> See Petition for Rehearing at 8-10, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (arguing that Court failed to note the performance of a mandatory inspection in *United Scottish*).

<sup>182</sup> See Brief for the United States, *United Scottish Ins. Co. v. United States*, No. CV No. 71-36E, slip op. (S.D. Cal. Feb. 24, 1980) (stating that inspection of heater was required under FAA regulations).

<sup>183</sup> See *supra* note 48 and accompanying text (noting that courts have held U.S. liable for failing to perform act required by statute).

<sup>184</sup> *Id.* See also *Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871, 875 (10th Cir. 1984); *Jayure Brand, Inc. v. United States*, 721 F.2d 385, 389 (D.C. Cir. 1983); *Hylan v. United States*, 715 F.2d 1206, 1213 (7th Cir. 1983); *Bergman v. United States*, 689 F.2d 789, 792 (8th Cir. 1982); *Reminga v. United States*, 631 F.2d 449, 456 (6th Cir. 1980).

tion with the Court's denial of USIC's petition for a rehearing, may have significantly narrowed the scope of government liability under the FTCA.<sup>185</sup> The decision indicates that the discretionary function exception will protect not only the acts of the government policy maker, but also the acts of individuals who carry out those policies at the operational level.<sup>186</sup> The decision of the Supreme Court in *Varig* suggests that federal regulatory agencies monitoring compliance of private industries with federal regulations will be fully protected from liability.<sup>187</sup> The broadly worded decision of the Court in *Varig* will signifi-

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<sup>185</sup> See Petition for Rehearing at 5, *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984). See also Hatfield, *View from Justice*, supra note 14, at 4 (arguing that ambiguity in *Varig* meant that Court extended discretionary function exception to negligent inspections). See also *Natural Gas Pipeline Co. v. United States*, 742 F.2d 502, 509 (9th Cir. 1984) (holding that *Varig* extends discretionary function exception to negligent inspection); *Proctor v. United States*, No. CV 83-3415, slip op. at 3, (C.D. Cal. Aug. 22, 1984) (finding *Varig* extended discretionary function exception to operational negligence).

<sup>186</sup> See *Varig*, 104 S. Ct. at 2765-68 (implying that discretionary function exception generally extends to negligence of all regulatory agency employees).

<sup>187</sup> See *Varig*, 104 S. Ct. at 2765 (finding that Congress intended to exempt the U.S. from liability where it regulates the conduct of private individuals). A review of the regulatory activities of government agencies reveals a wide range of inspection and certification activities. See, e.g., 42 U.S.C. § 1472 (1982) (Farmers Home Administration inspects homes built with financial assistance provided by the agency); 7 U.S.C. § 77 (1982) (Department of Agriculture (USDA) inspects and certifies grain shipped from the U.S. abroad); 21 U.S.C. § 455 (1982) (USDA inspects poultry products); 21 U.S.C. § 603 (1982) (USDA inspects cattle, sheep, swine, goats, horses, and mules before slaughtering, packing, or meat canning); 7 U.S.C. § 150(ff) (1982) (USDA inspects for plant pests on articles transported into the U.S.); 21 U.S.C. § 693 (1982) (USDA inspects and certifies dairy products intended for export); 33 U.S.C. § 1318 (1982) (Environmental Protection Agency (EPA) inspects premises where an effluent source is located); 15 U.S.C. § 2610 (1982) (EPA inspects premises where work with chemical substances is performed); 42 U.S.C. § 6927 (1982) (EPA inspects hazardous waste facilities); 7 U.S.C. § 136(g) (1982) (EPA inspects establishments where pesticides are distributed or sold); 45 U.S.C. § 23 (1982) (Department of Transportation (DoT) inspects locomotives); 46 U.S.C. § 39 (1982) (Coast Guard inspects and certifies biannually the hull and equipment of cargo barges over 100 tons); 15 U.S.C. § 1401 (1982) (DoT inspects facilities manufacturing automobiles); 49 U.S.C. § 1680 (1982) (DoT inspects pipeline facilities); 33 U.S.C. § 467 (1982) (Department of the Army inspects dams); 38 U.S.C. § 642 (1982) (Veterans Administration inspects state nursing homes); 18 U.S.C. § 923(g) (1982) (Department of Treasury inspects firearms or ammunition kept by importers, manufacturers, dealers and collectors); 15 U.S.C. § 1065 (1982) (Consumer Product Safety Commission inspects establishments manufacturing, holding, or transporting con-

catnly restrict recovery by plaintiffs in negligence actions against federal regulatory agencies.<sup>188</sup> Many federal agencies have inspection and certification authority similar to that of the FAA, and virtually every business that engages in interstate commerce is subject to some form of federal certification and licensing.<sup>189</sup> For example, the holding in *Varig* may extend to the Food and Drug Administration's inspection and certification of the safety of food and drugs,<sup>190</sup> the Federal Deposit Insurance Corporation's inspection of the financial records of federally insured banks,<sup>191</sup> the Occupational Safety and Health Administration's inspection of the safety and health conditions of most work places,<sup>192</sup> and the Mine Safety and Health Administration's inspection of the safety and health conditions of mines.<sup>193</sup>

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sumer products in commerce); and 42 U.S.C. § 5413 (1982) (Department of Housing and Urban Development inspects the construction of new homes).

<sup>188</sup> See, e.g., *Natural Gas Pipeline Co. v. United States*, 742 F.2d 502, 504 (9th Cir. 1984) (finding that *Varig* extended the discretionary function exception to entire certification process including negligent inspection); *Proctor v. United States*, No. CV 83-3415, slip op. at 9 (C.D. Cal. Aug. 21, 1984) (finding that *Varig* extended the discretionary function exception to negligent certification). See also Dombroff, *The High Court's Varig Decision Defines Limits of Federal Liability*, NAT'L L.J. Jul. 16, 1984, at 20 [hereinafter cited as Dombroff, *High Court Decision*] (arguing that *Varig* developed definite parameters of government liability).

<sup>189</sup> Brief for the United States at 26, *United States v. Varig Airlines*, 104 S.Ct. 2755 (1984) (discussing breadth of federal certification and regulation). See *supra* note 187 (reviewing variety of areas that U.S. government regulates and certifies).

<sup>190</sup> See, e.g., *Anglo-American & Overseas Corp. v. United States*, 144 F. Supp. 635 (S.D.N.Y. 1956) (holding government liable for negligent certification and inspection of tomato paste imported from overseas), *aff'd*, 242 F.2d 236 (2d Cir. 1957). The Food and Drug Administration inspects and certifies pursuant to 21 U.S.C. § 374 (1982).

<sup>191</sup> See, e.g., *First State Bank v. United States*, 599 F.2d 558 (3d Cir. 1979) (holding U.S. liable for failure of Federal Deposit Insurance Corporation to notify bank of improprieties discovered during inspection), *cert. denied*, 444 U.S. 1013 (1980). The Federal Deposit Insurance Corporation inspects financial records pursuant to 12 U.S.C. § 1820(b) (1982).

<sup>192</sup> See, e.g., *Davis v. United States*, 536 F.2d 748 (8th Cir. 1976) (holding U.S. liable for failure of Occupational Safety and Health Administration inspector to discover and warn about defective trench). The Occupational Safety and Health Administration inspects and certifies pursuant to 29 U.S.C. § 657 (1982).

<sup>193</sup> See, e.g., *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981) (holding U.S. not liable for alleged negligence of mine inspectors for failure to discover

The *Varig* decision will have a significant impact on the case law dealing with governmental liability for negligent inspection and certification.<sup>194</sup> The Court's reinterpretation of *Dalehite* as establishing the principle that the acts of all subordinates in exercising a discretionary program should fall within the discretionary function exception, will provide a distinct advantage to the government in FTCA litigation.<sup>195</sup> This broad interpretation of *Dalehite*, read in conjunction with the Court's virtual dismissal of *Indian Towing* and *Eastern Airlines* as irrelevant, may be viewed as an abandonment of the planning/operation distinction.<sup>196</sup> The Court's failure to discuss the planning/operation distinction may also be read as its abandonment of those cases that developed the distinction. After *Varig*, lower federal courts will have to speculate on whether the Court extended the discretionary function exception to operational inspections.<sup>197</sup> In denying the petition for rehearing, the Court missed an opportunity to clarify an area of law muddled with inconsistent decisions.<sup>198</sup>

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and cite a danger), *cert. denied*, 456 U.S. 944 (1982). The Mine Safety Health Administration inspects and certifies pursuant to 30 U.S.C. § 813 (1982).

<sup>194</sup> See generally Dombroff, *High Court Decision*, *supra* note 16 at 20 (suggesting that *Varig* may extend discretionary function exception to negligence of other federal agencies).

<sup>195</sup> See *supra* note 185 and accompanying text.

<sup>196</sup> See *Varig*, 104 S. Ct. at 2764 (finding that *Indian Towing* and *Eastern Airlines* did not affect the *Dalehite* decision). The Court seems to have replaced the planning/operation distinction with a regulatory/nonregulatory distinction. *Id.* at 2765.

<sup>197</sup> See *infra* note 199 and accompanying text.

<sup>198</sup> There exists a need to clarify the discretionary function exception because lower court decisions after *Dalehite* do not comprise a particularly coherent body of case law. See *United States v. Varig Airlines*, 104 S.Ct. 2755, 2766 (1984) (acknowledging inconsistencies in prior FTCA caselaw). Compare *Ashley v. United States*, 215 F. Supp. 39, 45-46 (D. Neb. 1963) (finding field decision on how to handle troublesome bear in national park protected by discretionary function exception), *aff'd*, 326 F.2d 499 (8th Cir. 1964), and *Miller v. United States*, 410 F. Supp. 425 (E.D. Mich. 1976) (finding negligent operation of waterworks protected by discretionary function exception) with *Downs v. United States*, 522 F.2d 990, 995 (6th Cir. 1975) (holding decision of FBI on how to handle aircraft hijacking not protected by discretionary function exception) and *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227, 230 (2d Cir.) (finding negligent operation of airport control

## A. Recent Cases

In the first FTCA action following *Varig*, *Proctor v. United States*,<sup>199</sup> a district court found that the *Varig* decision extended the discretionary function exception to negligent inspection at the operational level and consequently dismissed the case against the government.<sup>200</sup> In *Proctor*, 301 persons were killed in a fire on a Lockheed L-1011 in Riyadh, Saudi Arabia.<sup>201</sup> The plaintiffs, the subrogees of Saudi Arabian Airlines, were paid a total of \$52 million in settlement of claims, and alleged that the FAA negligently inspected the aircraft leading to the issuance of a faulty type certificate and the resulting accident.<sup>202</sup> The district court highlighted the *Varig* decision's emphasis on the policy of applying the discretionary function exception to the acts of regulatory agencies, regardless of whether the acts occur at the planning or operational level.<sup>203</sup> The

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tower not protected by discretionary function exception), *cert. denied*, 389 U.S. 931 (1967).

<sup>199</sup> No. CV 83-3415, slip op. at 2-4 (finding discretionary function exception extends to negligent inspection of aircraft).

<sup>200</sup> *Id.* at 4-6. The court in *Proctor*, in addition to relying on *Varig*, noted that holding the government liable for negligent inspection would render the FAA immune from liability under *Varig* if it certified an aircraft without an inspection, but subject to liability if it certified an aircraft after an inspection. *Id.* at 5-6. The court suggested that this would tend to encourage the FAA to inspect as few aircraft as possible and would be contrary to the FAA's statutory duty to promote safety in air transportation. *Id.* The United States District Court for the Eastern District of Washington found in *Mitchell v. United States*, however, that the planning/operation distinction was still the applicable test for application of the discretionary function exception. *Mitchell v. United States*, No. C-82-880 (E.D. Wash. Nov. 30, 1984) (order denying motions for summary judgment and dismissal). See also *Olsen By Sheldon v. Government of Mexico*, 729 F.2d 641, 647 (9th Cir. 1984) (decisions made at operational level are not within discretionary function exception, even though such decisions may involve elements of discretion); *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982) (considering ability of courts to evaluate actor omission of agency in application of discretionary function exception); *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975) (considering whether judicial administration would impair the effectiveness of the government).

<sup>201</sup> No. CV 83-3415, slip op. at 1.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 3-6. The court in *Proctor* relied on the Supreme Court's emphasis on the policy that a regulatory agency should not be held liable for negligent acts. *Id.* at 5.

district court dismissed the action against the government, finding that *Varig* was controlling.<sup>204</sup> The court stated that "it is clear that the Court [in *Varig*] adopted the much broader position urged by the government; that is, that the entire FAA certification process is immune from potential tort liability."<sup>205</sup>

In *Natural Gas Pipeline Co. v. United States*,<sup>206</sup> the Ninth Circuit found that *Varig* controlled a case arising out of a negligent inspection of two Rockwell business jets.<sup>207</sup> The plaintiffs in *Natural Gas Pipeline* alleged that the FAA was negligent in issuing the supplemental type certificate and in failing to promptly ground the defective aircraft.<sup>208</sup> The court in *Natural Gas Pipeline* suggested that after *Varig*, the entire system of reviewing compliance with federal regulation is protected by the discretionary function exception.<sup>209</sup>

The decisions in *Varig*, *Proctor* and *Natural Gas Pipeline* may also apply to actions for negligent inspection and certification against other government agencies that monitor private industries' compliance with federal regulations.<sup>210</sup> For example, the government used *Varig* to argue for application of the discretionary function exception to *General Public Utilities Corp. v. United States*.<sup>211</sup> In *General Public Utili-*

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<sup>204</sup> *Id.* at 6. See also *Seagram and Sons, Inc. v. United States*, No. 83-900-C, slip op. at 13 (S.D. Ind. Jan. 9, 1985) (finding that FAA certification process is immune from potential tort liability).

<sup>205</sup> *Id.* at 4.

<sup>206</sup> 742 F.2d 502, 504 (9th Cir. 1984) (finding discretionary function exception applies to negligent inspection for supplemental type certificate). In *Natural Gas Pipeline*, the FAA monitored and inspected the modification of two Rockwell business jets. *Id.* at 503.

<sup>207</sup> *Id.* The court found that the facts of *Natural Gas Pipeline* were similar to those in *Varig*. *Id.*

<sup>208</sup> *Id.* at 504.

<sup>209</sup> *Id.* at 504-05. The court, in dismissing the case, cited the holding in *Varig* which states that "the FAA's implementation of a mechanism for compliance review is plainly discretionary activity. . . ." *Id.* (quoting *United States v. Varig Airlines*, 104 S. Ct. 2755, 2768 (1984)).

<sup>210</sup> See generally, Dombroff, *High Court Decision*, *supra* note 16, at 18 (asserting that *Varig* may affect government tort liability in variety of government regulatory agencies).

<sup>211</sup> 551 F. Supp. 521, 523 (E.D. Pa. 1982) (finding negligent failure of the Nu-



ties, the plaintiffs alleged that the Nuclear Regulatory Commission negligently failed to inform General Public of a hazardous operating defect in its nuclear generating facility at Three Mile Island, in violation of a statutory duty.<sup>212</sup> The district court in *General Public Utilities* relied on the planning/operation distinction, which the Court impliedly eliminated in *Varig*.<sup>213</sup> The Third Circuit reversed on appeal, finding *Varig* controlling.<sup>214</sup>

*Varig* may also control the appeal of *Allen v. United States*.<sup>215</sup> In *Allen*, residents who lived downwind from a Nevada nuclear atmospheric testing site developed cancer and sued the government, alleging that their illnesses resulted from the government's failure to inform them of how to avoid or minimize known dangers.<sup>216</sup> The United States District Court for the District of Utah found that

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clear Regulatory Commission to inform plaintiff of Three Mile Island defect not protected by discretionary function exception), *aff'd*, 745 F.2d 239, 242 (3rd Cir. 1984). In *General Public Utilities*, the Three Mile Island Unit No. 2 nuclear generating facility experienced a near "melt-down" of its main core as a result of the malfunctioning of its cooling system. *Id.* at 522. As a result, radioactive material from the damaged core leaked from the building and exposed nearby residents to radiation, causing catastrophic damages which the plaintiffs claim exceed \$4 billion. *Id.* The plaintiffs allege that the NRC failed to disseminate information on a similar, but less severe, accident that occurred at the Davis-Besse nuclear generation station, produced by the same manufacturer as the facility at Three Mile Island. *Id.* at 523. The district court denied the government's motion to dismiss, finding that the action against the United States was not barred by the discretionary function exception. *Id.* at 531. The U.S. Court of Appeals for the Third Circuit affirmed, finding *Varig* controlling. *General Public Utilities Corp. v. United States*, 745 F.2d 239, 242 (3rd Cir. 1984).

<sup>212</sup> *Id.* at 523-24. The plaintiffs asserted that the NRC breached its self-imposed duties to warn of design defects, pursuant to 10 C.F.R. § 1.64, which requires the NRC to inform reactor operators of new safety developments. *Id.* at 523.

<sup>213</sup> *Id.* at 531. The court in *General Public Utilities* considered the amount of discretion available to the NRC scientists. *Id.* The court reviewed the exactness of the standards guiding the scientists and concluded that the scientists did not have the policy level discretion required by the planning/operation distinction in *Dalehite*. *Id.* See also *Feres v. United States*, No. 83-1402, Slip op. at 15 (6th Cir. Dec. 12, 1984) (finding *Varig* controlling regarding United States' failure to provide Chrysler employees with safety training).

<sup>214</sup> *General Public Utilities*, 745 F.2d at 242.

<sup>215</sup> 588 F. Supp. 247, 248 (D. Utah 1984) (finding that discretionary function exception does not protect negligent failure of government to warn of nuclear danger).

<sup>216</sup> *Id.* at 257.

the discretionary function exception did not protect the government's negligence in its 1950's atmospheric nuclear testing program.<sup>217</sup>

The *Varig* decision was clarified and distinguished in *McMichael v. United States*<sup>218</sup> in which plaintiffs sought recourse for deaths and injuries caused by an explosion at the government supervised Celesco munitions plant near Camden, Arkansas.<sup>219</sup> In *McMichael*, the Eighth Circuit affirmed the district court's order denying the United States' motion to dismiss the complaints.<sup>220</sup> The Eighth Circuit, in distinguishing *Varig*, emphasized that *Varig* concerned regulatory government functions and that *McMichael* involved the Defense Department as a proprietor.<sup>221</sup> The court in *McMichael* also emphasized that, while *Varig* involved an optional inspection, *McMichael* involved mandatory inspections by on-site government inspectors.<sup>222</sup> The court also noted that the government inspectors in *McMichael* had primary responsibility for inspection, and that private industry was the primary inspector in *Varig*.<sup>223</sup>

## B. *Varig*: Policy Analysis

If the United States were held liable for policy-level decisions regarding the spot-check system, it might become

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<sup>217</sup> *Id.* at 3710. The court found that the government's failure to monitor the effects of fallout on the nearby population and warn them of the dangers did not fall within the ambit of the discretionary function exception. *Id.*

<sup>218</sup> 751 F.2d 303 (8th Cir. 1985) (affirming district court order denying United States motion to dismiss).

<sup>219</sup> *Id.* at 304. The plaintiffs alleged that the government was negligent in (1) awarding a contract to produce a highly dangerous commodity to Celesco, which did not possess the necessary skills or facilities to fulfill the contract; (2) promulgating inadequate safety standards; and (3) failing to enforce Celesco's compliance with safety requirements set forth in the manual. *Id.*

<sup>220</sup> *Id.* at 305, affirming *McMichael v. Bartlett*, 521 F.Supp. 1273 (W.D. Ark. 1981).

<sup>221</sup> *Id.* at 306.

<sup>222</sup> *Id.* at 307. The court in *McMichael* emphasized that the inspectors were not in a position to make discretionary spot-checks, but rather had a number of precise inspections to perform that involved no judgment or agency policy. *Id.*

<sup>223</sup> *Id.*

an insurer of the conduct of private parties.<sup>224</sup> The Government would need to significantly increase the strength of its enforcement apparatus if it were an insurer of private conduct.<sup>225</sup> A decision such as this, by virtue of the financial commitment involved, should be made by Congress and not by the courts. Victims of aircraft accidents and their families will also continue to be fully compensated for damages after *Varig*.<sup>226</sup> The *Varig* decision merely shifts liability from the United States to the manufacturers and aircraft operators.<sup>227</sup> Finally, a policy that holds the United States liable for negligent inspection would lead to the anomaly of holding the United States liable where it attempts to enforce government regulations and shielding it from liability when it decides not to inspect at all.<sup>228</sup> This result may create a disincentive for the United States to strengthen its enforcement efforts. Courts interpreting *Varig*, however, should distinguish between situations where the United States has a secondary role in enforcement and where it has the primary role for enforcement or operation.<sup>229</sup>

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<sup>224</sup> See *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984) (finding that extending discretionary function exception to spot-check system would make U.S. insurer of private industry); see Hatfield, *The Non-Liability of the Government for Certification of Aircraft*, *supra* note 128 at 607 (arguing that allowing recovery for negligent certification would make U.S. an insurer of air travel); see generally Dombroff, *High Court Decision*, *supra* note 16, at 20 (discussing *Varig*'s development of definite parameters of governmental immunity).

<sup>225</sup> See Interview with James S. Dillman, Assistant Chief Counsel for Litigation, Federal Aviation Administration, Washington, D.C. (March 15, 1985).

<sup>226</sup> *Id.* In aviation tort cases, the total amount of damages is usually estimated and established prior to final disposition of case. *Id.* *Varig* will place the higher percentage of fault on the noncarriers and operators at settlement, but it will not reduce the total damages recovered. *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See *Proctor v. United States*, No. CV 83-3415, slip op. at 2-4 (C.D. Cal. Aug. 22, 1984) (finding discretionary function exception extends to negligent inspection of aircraft).

<sup>229</sup> See *McMichael*, 588 F.2d at 304 (affirming district court order denying motion of United States to dismiss, thus suggesting that United States should be held liable where it has primary role in enforcement of contract).

## VII. CONCLUSION

In *United States v. Varig Airlines*,<sup>230</sup> the Supreme Court extended the protection of the discretionary function exception to "operational" governmental activities, such as those where an employee merely carries out a decision made by a superior. Prior caselaw, developed since the mid-1950's, imposed liability on the government for such negligent operational activities. Those cases imposed liability for government negligence where employees carried out orders in a negligent manner and shielded the government from liability where employees exercised discretion at the policy making level.

*Varig* places the entire FAA certification and inspection process under the protection of the discretionary function exception. The implications of *Varig* are broad and significant. Under the decision, any regulatory agency that monitors private industries' compliance with federal regulations may be immune from liability under the FTCA.

*Varig* is a weak decision because of its inadequate treatment of prior caselaw, its failure to correctly note the facts and federal regulations applicable to the joined case, *United Scottish*, and its excessively broad scope. The *Varig* decision sets unclear precedent and it will require federal courts to speculate regarding the treatment of the discretionary function exception to the Federal Tort Claims Act.

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<sup>230</sup> 104 S. Ct. 2755 (1984).



# **Casenotes and Statute Notes**

